UNITED STATES REPORTS

VOLUME 412

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1972

MAY 17 THROUGH JUNE 19, 1973

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM O. DOUGLAS, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.

RETIRED

EARL WARREN, Chief Justice.
STANLEY REED, Associate Justice.
TOM C. CLARK, Associate Justice.

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ELLIOT L. RICHARDSON, Attorney General.[2]
ERWIN N. GRISWOLD, Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
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[1] Attorney General Kleindienst resigned effective May 25, 1973.

[2] Mr. Elliot L. Richardson, of Massachusetts, was nominated to be Attorney General by President Nixon on May 1, 1973. The nomination was confirmed by the Senate on May 23, 1973; he was commissioned on May 24, 1973; and took the oath of office on May 25, 1973.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

January 7, 1972.

(For next previous allotment, see 403 U. S., p. IV.)

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(C) TREATY

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1972

HALL ET AL. *v.* COLE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 72-630. Argued March 21, 1973—Decided May 21, 1973

Respondent, expelled from his union for deliberate and malicious vilification of union management following his resolutions unsuccessfully condemning that management's alleged undemocratic actions and shortsighted policies, regained his union membership in a suit under § 102 of the Labor-Management Reporting and Disclosure Act (LMRDA) and was awarded $5,500 in legal fees. The Court of Appeals affirmed. *Held:*

1. Respondent's suit under § 102 of the LMRDA vindicated not only his own rights of free speech guaranteed by the statute but furthered the interests of the union and its members as well. As a result, the award to respondent of attorneys' fees under these circumstances comported with the trial court's inherent equitable power of making such an award whenever "overriding considerations indicate the need for such a recovery." *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 391-392. Pp. 4-9.

2. The allowance of counsel fees to the successful plaintiff in a suit brought under § 102 is not precluded by that statutory provision and, indeed, is supported by the legislative history of the LMRDA. Pp. 9-14.

3. Under all the facts of the case, the District Court did not

abuse its discretion in awarding counsel fees to respondent. Pp. 14–15.

462 F. 2d 777, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, STEWART, BLACKMUN, and POWELL, JJ., joined. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 16. MARSHALL, J., took no part in the consideration or decision of the case.

Howard Schulman argued the cause and filed a brief for petitioners.

Burton H. Hall argued the cause and filed a brief for respondent.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case requires us to consider the propriety of an award of counsel fees to a successful plaintiff in a suit brought under § 102 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 523, 29 U. S. C. § 412.[1] On August 6, 1962, at a regular meeting of the membership of petitioner Seafarers International Union of North America—Atlantic, Gulf, Lakes and Inland Waters District, respondent introduced a set of resolutions alleging various instances of undemocratic actions and shortsighted policies on the part of union officers.

**J. Albert Woll*, *Laurence Gold*, and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal.

Melvin L. Wulf and *Sanford J. Rosen* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

[1] Section 102 of the Act, 29 U. S. C. § 412, provides in pertinent part:

"Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate."

The resolutions were defeated and, on November 26, 1962, respondent was expelled from the union on the ground that his presentation of the resolutions violated a union rule proscribing "deliberate or malicious vilification with regard to the execution or the duties of any office or job." After exhausting his intra-union remedies, respondent filed this suit under § 102 of the LMRDA, claiming that his expulsion under these circumstances violated his right of free speech as secured by § 101 (a)(2) of the Act, 29 U. S. C. § 411 (a)(2).[2]

On May 27, 1964, the United States District Court for the Eastern District of New York issued a temporary injunction restoring respondent's membership in the union, and the United States Court of Appeals for the Second Circuit affirmed. 339 F. 2d 881 (1965). Some five years later, the case came on for trial and the District Court, finding a violation of respondent's rights under § 101 (a)(2), ordered him permanently reinstated to membership in the union and, although denying respondent's damages claims.[3] granted him counsel fees in the sum of $5,500 against the union. The Court of

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[2] Section 101 (a)(2) of the Act, 29 U. S. C. § 411 (a)(2), provides:

"Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

[3] In its unreported opinion, the District Court found that respondent "suffered no loss of wages as a result of his expulsion from the union." And although respondent "was deprived of his right

Appeals affirmed in all respects, 462 F. 2d 777 (1972). We granted certiorari limited to the questions whether (1) an award of attorneys' fees is permissible under § 102 of the LMRDA, and (2) if so, whether such an award under the facts of this case constituted an abuse of the District Court's discretion. 409 U. S. 1074. We affirm.

I

Although the traditional American [4] rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory [5] or contractual authorization, [6] federal courts,

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to attend meetings, and run for union office" during the period of his expulsion, the District Court concluded that "[t]he record is barren of any proof on which the court might make a determination of the value of [these rights]." Finally, the court denied respondent's claim for punitive damages on the ground that the union's decision to expel respondent was motivated neither by malice nor bad faith.

[4] The American rule, it might be noted, is more restrictive than the general rule that prevails in most other nations. See, *e. g.*, Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Calif. L. Rev. 792, 793 (1966). Many commentators have argued for a "liberalization" of the American rule. See, *e. g.*, Stoebuck, Counsel Fees Included in Costs: A Logical Development, 38 U. Colo. L. Rev. 202 (1966); Ehrenzweig, *supra;* Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation?, 49 Iowa L. Rev. 75 (1963); McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 Minn. L. Rev. 619 (1931); Comment, The Allocation of Attorney's Fees After *Mills* v. *Electric Auto-Lite Co.*, 38 U. Chi. L. Rev. 316 (1971); Note, Attorney's Fees: Where Shall the Ultimate Burden Lie?, 20 Vand. L. Rev. 1216 (1967).

[5] See, *e. g.*, Clayton Act, § 4, 38 Stat. 731, 15 U. S. C. § 15; Communications Act of 1934, § 206, 48 Stat. 1072, 47 U. S. C. § 206; Interstate Commerce Act, § 16, 34 Stat. 590, 49 U. S. C. § 16 (2); Securities Exchange Act of 1934, §§ 9 (e), 18 (a), 48 Stat. 890, 897, 15 U. S. C. §§ 78i (e), 78r (a).

[6] See, *e. g.*, *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714, 717 (1967); *Hauenstein* v. *Lynham,* 100 U. S. 483 (1880); *Day* v. *Woodworth,* 13 How. 363 (1852).

in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require. Indeed, the power to award such fees "is part of the original authority of the chancellor to do equity in a particular situation," *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 166 (1939), and federal courts do not hesitate to exercise this inherent equitable power whenever "overriding considerations indicate the need for such a recovery." *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 391–392 (1970); see *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714, 718 (1967).

Thus, it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." 6 J. Moore, Federal Practice ¶ 54.77 [2], p. 1709 (2d ed. 1972); see, *e. g.*, *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 n. 4 (1968); *Vaughan* v. *Atkinson*, 369 U. S. 527 (1962); *Bell* v. *School Bd. of Powhatan County*, 321 F. 2d 494 (CA4 1963); *Rolax* v. *Atlantic Coast Line R. Co.*, 186 F. 2d 473 (CA4 1951). In this class of cases, the underlying rationale of "fee shifting" is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of "bad faith" on the part of the unsuccessful litigant.

Another established exception involves cases in which the plaintiff's successful litigation confers "a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." *Mills* v. *Electric Auto-Lite, supra,* at 393–394.[7] "Fee shifting"

[7] This exception has its origins in the "common fund" cases, which have traditionally awarded attorneys' fees to the successful plaintiff when his representative action creates or traces a "common fund," the economic benefit of which is shared by all members of the class.

is justified in these cases, not because of any "bad faith" of the defendant but, rather, because "[t]o allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Id.*, at 392; see also *Fleischmann Distilling Corp.* v. *Maier Brewing Co., supra,* at 719; *Trustees* v. *Greenough,* 105 U. S. 527, 532 (1882). Thus, in *Mills* v. *Electric Auto-Lite Co., supra,* we approved an award of attorneys' fees to successful shareholder plaintiffs in

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See, *e. g., Central Railroad & Banking Co.* v. *Pettus,* 113 U. S. 116 (1885); *Trustees* v. *Greenough,* 105 U. S. 527 (1882). In *Sprague* v. *Ticonic National Bank,* 307 U. S. 161 (1939), the rationale of these cases was extended to authorize an award of attorneys' fees to a successful plaintiff who, although suing on her own behalf rather than as representative of a class, nevertheless established the right of others to recover out of specific assets of the same defendant through the operation of *stare decisis.* In reaching this result, the Court explained that the beneficiaries of the plaintiff's litigation could be made to contribute to the costs of the suit by an order reimbursing the plaintiff out of the defendant's assets from which the beneficiaries eventually would recover. Finally, in *Mills* v. *Electric Auto-Lite Co.,* 396 U. S. 375 (1970), we held that the rationale of these cases must logically extend, not only to litigation that confers a monetary benefit on others, but also to litigation "'which corrects or prevents an abuse which would be prejudicial to the rights and interests'" of those others. *Id.,* at 396, quoting *Bosch* v. *Meeker Cooperative Light & Power Assn.,* 257 Minn. 362, 366–367, 101 N. W. 2d 423, 427 (1960).

Citing our decisions in *Mills, supra,* and *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U. S. 400 (1968), respondent contends that the award of attorneys' fees in this case might also be justified on the ground that, by successfully prosecuting this litigation, respondent acted as a "'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Id.,* at 402. See also *Knight* v. *Auciello,* 453 F. 2d 852 (CA1 1972); *Lee* v. *Southern Home Sites Corp.,* 444 F. 2d 143 (CA5 1971). In light of our conclusion with respect to the "common benefit" rationale, however, we have no occasion to consider that question.

a suit brought to set aside a corporate merger accomplished through the use of a misleading proxy statement in violation of § 14 (a) of the Securities Exchange Act of 1934, 48 Stat. 895, 15 U. S. C. § 78n (a). In reaching this result, we reasoned that, since the dissemination of misleading proxy solicitations jeopardized important interests of both the corporation and " 'the stockholders as a group,' " [8] the successful enforcement of the statutory policy necessarily "rendered a substantial service to the corporation and its shareholders." *Mills* v. *Electric Auto-Lite Co., supra,* at 396. Under these circumstances, reimbursement of the plaintiffs' attorneys' fees out of the corporate treasury simply shifted the costs of litigation to "the class that has benefited from them and that would have had to pay them had it brought the suit." *Id.,* at 397.

The instant case is clearly governed by this aspect of *Mills.* The Labor-Management Reporting and Disclosure Act of 1959 was based, in part, on a congressional finding "from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct . . . ." 29 U. S. C. § 401 (b). In an effort to eliminate these abuses, Congress recognized that it was imperative that all union members be guaranteed at least "minimum standards of democratic process. . . ." [9] Thus, Title I [10] of the LMRDA—the "Bill of Rights of Members of Labor Organizations"—was specifically designed to promote the "full and active par-

[8] *Mills* v. *Electric Auto-Lite Co., supra,* at 392, quoting *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 432 (1964).

[9] 105 Cong. Rec. 6471 (1959) (Sen. McClellan).

[10] 29 U. S. C. §§ 411–415.

ticipation by the rank and file in the affairs of the union," [11] and, as the Court of Appeals noted, the rights enumerated in Title I [12] were deemed "vital to the independence of the membership and the effective and fair operation of the union as the representative of its membership." 462 F. 2d, at 780. See also *International Assn. of Machinists* v. *Nix,* 415 F. 2d 212 (CA5 1969); *Salzhandler* v. *Caputo,* 316 F. 2d 445 (CA2 1963).

Viewed in this context, there can be no doubt that, by vindicating his own right of free speech guaranteed by § 101 (a)(2) of Title I of the LMRDA, respondent necessarily rendered a substantial service to his union as an institution and to all of its members. When a union member is disciplined for the exercise of any of the rights protected by Title I, the rights of all members of the union are threatened. And, by vindicating his own right, the successful litigant dispels the "chill" cast upon the rights of others. Indeed, to the extent that such lawsuits contribute to the preservation of union democracy, they frequently prove beneficial "not only in the immediate impact of the results achieved but in their implications for the future conduct of the union's affairs." *Yablonski* v. *United Mine Workers of America,* 150 U. S. App. D. C. 253, 260, 466 F. 2d 424, 431 (1972). Thus, as in *Mills,* reimbursement of respondent's attorneys' fees

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[11] *American Federation of Musicians* v. *Wittstein,* 379 U. S. 171, 182–183 (1964).

[12] In addition to the Tit. I guarantee of freedom of speech and assembly involved in this case, 29 U. S. C. § 411 (a)(2), see n. 2, *supra,* Tit. I also guarantees equal "political" rights to all union members, 29 U. S. C. § 411 (a)(1); stability and fairness in the assessment of dues, initiation fees, and other assessments, 29 U. S. C. § 411 (a)(3); the right of all union members to sue and to participate in litigation, 29 U. S. C. § 411 (a)(4); and procedural fairness in the discipline process, 29 U. S. C. § 411 (a)(5).

out of the union treasury [13] simply shifts the costs of litigation to "the class that has benefited from them and that would have had to pay them had it brought the suit." *Mills* v. *Electric Auto-Lite Co., supra,* at 397. See also *Yablonski* v. *United Mine Workers of America, supra; Robins* v. *Schonfeld,* 326 F. Supp. 525 (SDNY 1971); *Cefalo* v. *International Union of District 50 United Mine Workers,* 311 F. Supp. 946 (DC 1970); *Sands* v. *Abelli,* 290 F. Supp. 677 (SDNY 1968). We must therefore conclude that an award of counsel fees to a successful plaintiff in an action under § 102 of the LMRDA falls squarely within the traditional equitable power of federal courts to award such fees whenever "overriding considerations indicate the need for such a recovery." *Mills* v. *Electric Auto-Lite Co., supra,* at 391–392.

II

This does not end our inquiry, however, for even where "fee-shifting" would be appropriate as a matter of equity, Congress has the power to circumscribe such relief. In *Fleischmann Distilling Corp.* v. *Maier Brewing Co., supra,* for example, we held that § 35 of the Lanham Act, 60 Stat. 439, 15 U. S. C. § 1117, precluded an award of attorneys' fees as a separate element of recovery in a suit for deliberate infringement of a trademark. In reaching that result, we reasoned that, since § 35 "meticulously detailed the remedies available to a plaintiff

[13] Petitioners contend that the payment of counsel fees out of the union treasury might deplete union funds to such an extent as to impair the union's ability to operate as an effective collective-bargaining agent and to endanger union stability. Although this consideration is undoubtedly an important one, it is relevant, not to the *power* of federal courts to award counsel fees generally, but, rather, to the exercise of the District Court's discretion on a case-by-case basis. See n. 23, *infra.*

who proves that his valid trademark has been infringed," Congress must have intended the express remedial provisions of § 35 "to mark the boundaries of the power to award monetary relief in cases arising under the Act." *Id.*, at 719, 721. Petitioners contend that this reasoning dictates a similar conclusion with respect to § 102 of the LMRDA. We do not agree. Unlike § 35 of the Lanham Act, which specifically "provided not only for injunctive relief, but also for compensatory recovery measured by the profits that accrued to the defendant by virtue of his infringement, the costs of the action, and damages which may be trebled," [14] § 102 of the LMRDA broadly authorizes the courts to grant "such relief (including injunctions) as may be appropriate." 29 U. S. C. § 412. Thus, § 102 does not "meticulously detail the remedies available to a plaintiff," and we cannot fairly infer from the language of that provision an intent to deny to the courts the traditional equitable power to grant counsel fees in "appropriate" situations.

Petitioners argue further, however, that because Congress expressly authorized the recovery of counsel fees in §§ 201 (c) and 501 (b) of the LMRDA, 29 U. S. C. §§ 431 (c), 501 (b), the absence of a similar express provision in § 102 indicates an intent to preclude "fee-shifting" in suits brought under that section. Sections 201 (c) and 501 (b), which are not a part of Title I, deal with narrowly defined problems under the Act, and specifically authorize such limited remedies as an examination of the union's books and records and an accounting.[15] By contrast, § 102 was premised upon the fact

[14] *Fleischmann Distilling Corp.* v. *Maier Brewing Co., supra,* at 719.

[15] Section 201 (c) provides for the award of counsel fees in a suit brought by a union member to obtain access to union books, records, and accounts to verify annual financial statements. 29 U. S. C. § 431 (c). Section 501 (b) authorizes "fee shifting" in a suit brought

that Title I litigation necessarily demands that remedies "be tailored to fit facts and circumstances admitting of almost infinite variety," [16] and § 102 was therefore cast as a broad mandate to the courts to fashion "appropriate" relief. Indeed, any attempt on the part of Congress to spell out all of the remedies available under § 102 would create the "danger that those [remedies] not listed might be proscribed with the result that the courts would be fettered in their efforts to 'grant relief according to the necessities of the case.'" *Gartner* v. *Soloner*, 384 F. 2d 348, 353 (CA3 1967). See *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, *supra*. Confronted with a virtually identical situation in *Mills*, we explained that the inclusion in certain sections of the Securities Exchange Act of 1934 of express provisions for recovery of attorneys' fees "should not be read as denying to the courts the power to award counsel fees in suits under other sections of the Act when circumstances make such an award appropriate . . . ." 396 U. S., at 390–391. That reasoning is equally persuasive today.[17]

Finally, petitioners call our attention to two isolated comments in the legislative history of Title I—one by Senator Goldwater in his testimony before a House Com-

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by a member against a union official to recover damages or for an accounting for the benefit of the union on the ground that the official is violating his duties. 29 U. S. C. § 501 (b).

[16] *Gartner* v. *Soloner*, 384 F. 2d 348, 353 (CA3 1967).

[17] Indeed, the *Mills* reasoning may be particularly appropriate with respect to the LMRDA. As Professor Cox has noted, "because much of the bill was written on the floor of the Senate or House of Representatives and because many sections contain calculated ambiguities or political compromises . . . , the courts would be well advised to seek out the underlying rationale without placing great emphasis upon close construction of the words," Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 852 (1960).

mittee [18] and the other contained in a dissenting statement to a House Committee Report [19]—expressing the fear that, in the absence of a specific provision for the award of counsel fees, such relief would be unavailable in suits brought under § 102. Although these statements plainly indicate "a feeling by some members of the Congress that it would have been desirable and prudent to spell out unmistakably a right to attorney's fees," they "hardly amount to a definitive and absolute setting of the Congressional face against the giving of such incidental relief by the courts where compatible with sound and established equitable principles." *Yablonski* v. *United Mine Workers of America,* 150 U. S. App. D. C., at 258, 466 F. 2d, at 429. See *Gartner* v. *Soloner, supra,* at 352. Indeed, both of these comments expressly *favored* the allowance of counsel fees in Title I litigation, and there is no suggestion anywhere in the

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[18] In his testimony before the House Committee on Education and Labor, after passage of the Senate version of the LMRDA, Senator Goldwater stated that "the bill does not grant [the union member], even where successful in his suit, reasonable counsel fees or other costs. It thus forces him to assume the entire financial burden of the litigation. For an ordinary rank-and-file union member who is generally a wage worker, such a litigation thus becomes an impossible financial burden." 105 Cong. Rec. 10095 (1959).

[19] In opposing the reporting of the Elliott bill, H. R. 8342, 86th Cong., 1st Sess. (1959), to the House, the nine dissenting Members of the House Committee on Education and Labor protested that "[u]nder that bill the individual member must shoulder the burden of litigation costs himself." H. R. Rep. No. 741, 86th Cong., 1st Sess., 95 (1959). At the end of their criticisms of the Elliott bill, the dissenters explained that "[f]or the reasons outlined above, we intend to support . . . the so-called Landrum-Griffin bill (H. R. 8400 and 8401)." *Id.,* at 98. Thus, although the enforcement provisions of the Elliott bill and the Landrum-Griffin bill were virtually identical, the dissenters apparently believed that the latter, which eventually was enacted, allowed the union member to recover counsel fees.

legislative history that even a single member of Congress was opposed to such relief or desired the words "such relief . . . as may be appropriate" to restrict the historic equity powers of the federal courts. On the contrary, there are numerous expressions by sponsors and other supporters of the Act indicating that § 102 was intended to afford the courts "a wide latitude to grant relief according to the necessities of the case," [20] and "to give such relief as [the court] deems equitable under all the circumstances." [21]

Moreover, the award of attorneys' fees under § 102 is clearly consonant with Congress' express desire to adopt "legislation that will afford necessary protection of the rights and interests of employees and the public generally . . . ." 29 U. S. C. § 401 (b). As the Court of Appeals recognized:

> "Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. It is difficult for individual members of labor unions to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own. . . . An individual union member could not carry such a heavy financial burden. Without counsel fees the grant of federal jurisdiction is but a gesture for few union members could avail themselves of it." 462 F. 2d, at 780–781.

Thus, it is simply "untenable to assert that in establishing the bill of rights under the Act Congress intended to have those rights diminished by the unescapable fact that

[20] 105 Cong. Rec. 15548 (1959) (Rep. Elliott).

[21] *Id.*, at 6717 (Sen. Kuchel). See *id.*, at 15864 *et seq.* (Rep. O'Hara); see also 29 U. S. C. §§ 413, 523 (a).

an aggrieved union member would be unable to finance litigation . . . ." *Gartner* v. *Soloner, supra,* at 355. See *Yablonski* v. *United Mine Workers of America, supra,* at 259, 466 F. 2d, at 430; *Robins* v. *Schonfeld,* 326 F. Supp., at 531; *Sands* v. *Abelli,* 290 F. Supp., at 686; cf. *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U. S., at 402. We therefore hold that the allowance of counsel fees to the successful plaintiff in a suit brought under § 102 of the LMRDA is consistent with both the Act and the historic equitable power of federal courts to grant such relief in the interests of justice.

III

Finally, petitioners maintain that the award of counsel fees to respondent under the facts of this case constituted an abuse of the District Court's discretion. Specifically, petitioners argue that the District Court's finding that some of respondent's actions "were, in part, motivated by [his] political ambitions for union office" represents a finding of "bad faith" on the part of respondent. The District Court clearly rejected the "logic" of this contention, and we agree. Title I of the LMRDA was specifically designed to protect the union member's right to seek higher office within the union,[22] and we can hardly accept the proposition that the exercise of that right is tantamount to "bad faith." See *Yablonski* v. *United Mine Workers of America, supra,* at 259–260, 466 F. 2d, at 430–431.

[22] In describing to the Senate the various "offenses" for which a union member could be expelled under then-existing union constitutions, Senator McClellan pointed out in particular the "offense" of "applying for the position of another union man in office." He observed, with evident sarcasm, that: "A member had better not do that. The officers have squatters' rights. Members had better not offer any competition. They had better not seek election. They had better not aspire to the presidency or the secretaryship, or they will be expelled or disciplined." 105 Cong. Rec. 6478 (1959).

Petitioners also contend that the award of attorneys' fees in this case was improper because the District Court, in denying respondent's claim for punitive damages, found that "the defendants, in good faith, believed that they had a right to charge and discipline [respondent] for his actions." It is clear, however, that "bad faith" may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation. And, as the Court of Appeals noted, the conduct of this particular litigation was marked by "the dilatory action of the union and its officers . . . ." 462 F. 2d, at 780. Moreover, although the presence of "bad faith" is essential to "fee-shifting" under a "punishment" rationale, neither the presence nor absence of "bad faith" is in any sense dispositive where attorneys' fees are awarded to the successful plaintiff under the "common benefit" rationale recognized in *Mills* and operative today. Under that theory, counsel fees are granted, not because of the "bad faith" of the defendant but, rather, because the litigation confers substantial benefits on an ascertainable class of beneficiaries. In that situation, the element of "bad faith" of the defendant is simply one of many considerations best addressed to the sound discretion of the District Court.[23] Under the facts of this case, we cannot say that the District Court abused that discretion.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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[23] Another such consideration is, of course, the extent to which the payment of the plaintiff's counsel fees out of the union treasury might impair the union's ability to operate effectively. See n. 13, *supra*. Here, petitioners do not, and indeed cannot, contend that the award of only $5,500 would in any sense jeopardize union stability.

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, dissenting.

I would need a far clearer signal from Congress than we have here to permit awarding attorneys' fees in member-union litigation, which so often involves private feuding having no general significance. The award of fees in the occasionally successful and meritorious case will not be worth the litigation the Court's decision will invite and foster.

CHAFFIN *v.* STYNCHCOMBE, SHERIFF

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71–6732. Argued February 22, 1973—Decided May 21, 1973

Upon retrial following the reversal of his conviction, petitioner was again found guilty and sentenced by the jury to a greater term than had been imposed by the first jury. After exhausting his state court appeals, petitioner was denied habeas corpus on his claim that imposing a higher sentence on retrial was unconstitutional, and the Court of Appeals affirmed. *Held:* The rendition of a higher sentence by a jury upon retrial does not violate the Double Jeopardy Clause, *North Carolina* v. *Pearce*, 395 U. S. 711, 719–721, and does not offend the Due Process Clause as long as the jury is not informed of the prior sentence and the second sentence is not otherwise shown to be a product of vindictiveness. Nor does the possibility of a higher sentence impermissibly "chill" the exercise of a criminal defendant's right to challenge his first conviction by direct appeal or collateral attack. Pp. 23–35.

455 F. 2d 640, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting statement, *post*, p. 35. STEWART, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 35. MARSHALL, J., filed a dissenting opinion, *post*, p. 38.

Glenn Zell, by appointment of the Court, 409 U. S. 1123, argued the cause and filed a brief for petitioner.

Richard E. Hicks argued the cause for respondent. On the brief were *Lewis R. Slaton, Joel M. Feldman*, and *Carter Goode*.*

**David M. Pack*, Attorney General, *pro se*, and *Bart C. Durham*, Assistant Attorney General, filed a brief for the Attorney General of Tennessee as *amicus curiae*.

MR. JUSTICE POWELL delivered the opinion of the Court.

A writ of certiorari was granted in this case to consider whether, in those States that entrust the sentencing responsibility to the jury, the Due Process Clause of the Fourteenth Amendment bars the jury from rendering higher sentences on retrials following reversals of prior convictions. In *North Carolina* v. *Pearce,* 395 U. S. 711 (1969), this Court established limitations on the imposition of higher sentences by judges in similar circumstances. While we reaffirm the underlying rationale of *Pearce* that vindictiveness against the accused for having successfully overturned his conviction has no place in the resentencing process, whether by judge or jury, we hold today that due process of law does not require extension of *Pearce*-type restrictions to jury sentencing.

I

Early in 1969, petitioner was tried by a jury in a Georgia state criminal court on a charge of robbery by open force or violence, a capital offense at that time. The jury, which had been instructed that it was empowered to impose a sentence of death, life imprisonment, or a term of years,[1] found petitioner guilty and sentenced him to 15 years in prison. He appealed to the Georgia Supreme Court, claiming primarily that the trial judge had given an erroneous jury instruction as to the

[1] Petitioner was indicted under a statute that provided for the following range of punishments:

"Robbery by open force or violence shall be punished by death, unless the jury recommends mercy, in which event punishment shall be imprisonment in the penitentiary for life: Provided, however, the jury in all cases may recommend that the defendant be imprisoned in the penitentiary for not less than four years nor longer than 20 years, in the discretion of the court." Ga. Code Ann. § 26–2502 (1935), replaced by Ga. Code Ann. § 26–1902 (1972).

defendant's burden of proving an alibi defense. His claim was rejected and his conviction was affirmed. 225 Ga. 602, 170 S. E. 2d 426 (1969). Thereafter, he renewed that claim in a petition for a writ of habeas corpus to the United States District Court for the Northern District of Georgia. The District Court found petitioner's contention meritorious, granted the writ, and ordered him returned to the state court for retrial.

Upon retrial before a different judge and a new jury, petitioner was again found guilty. A comparison of the trial transcripts in the two cases indicates that the trials were similar in most respects. The case was prosecuted on both occasions by the same State's attorney and the same prosecution witnesses testified to the facts surrounding the alleged robbery. Petitioner, however, was represented by new counsel and, in addition to repeating his alibi defense, he interposed an insanity defense not offered at the former trial. New witnesses were called to testify for both sides on this issue. Also, while petitioner took the stand and made an unsworn statement in each case, his statement at the latter trial was longer and contained autobiographical information not presented to the former jury, including an emotional discussion of his family background, an account of his religious affiliation, job history, previous physical injuries, and a rendition of several religious poems and songs he had written.[2]

The jury instructions on the permissible range of punishment were the same at each trial and the prosecutor at the second trial urged the jury to sentence petitioner to death, as he had in his closing argument at the prior trial.[3] This time, however, the jury returned a sentence

[2] For a detailed description of the unique unsworn-statement practice in Georgia see *Ferguson* v. *Georgia,* 365 U. S. 570 (1961).

[3] During oral argument in this Court, counsel disagreed as to whether the prosecutor asked for the death penalty at the first

of life imprisonment. The parties agree that the jury was not aware of the length of the sentence meted out by the former jury. And, although the jury was informed by one of petitioner's own witnesses that he had been tried previously on the same charge,[4] the jury was not told that petitioner had been convicted and that his conviction had been overturned on collateral attack.[5]

Claiming primarily that it was improper for the State to allow the jury to render a harsher sentence on retrial, petitioner appealed again to the State Supreme Court. That court affirmed the lower court's judgment and refused to alter petitioner's sentence. 227 Ga. 327, 180 S. E. 2d 741 (1971). He then filed his second application for habeas relief in the Federal District Court, arguing that the higher sentence was invalid under *Pearce*.

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trial. Tr. of Oral Arg. 13, 26, 32–33. At the Court's request, counsel have filed post-argument affidavits on this question. Although the closing arguments themselves were not transcribed, the State prosecutor states that, while his memory is not entirely clear on the matter, his notes indicate, and his customary practice suggests, that he asked for the death sentence at both trials. Any remaining doubt is foreclosed by the affidavit filed by the attorney who represented petitioner during the first trial. He states unequivocally that the prosecutor argued "vigorously" in favor of imposition of the death penalty during the closing argument in that trial.

[4] During the second trial, petitioner's counsel from the first trial was called to testify in petitioner's behalf in support of his insanity defense. The substance of his testimony was that he had an ample opportunity to study petitioner during the previous proceedings and that he was convinced that petitioner was suffering from a "mental defect." He explained that, despite his own evaluation, he acquiesced in petitioner's request that he not interpose an insanity defense at that time.

[5] At the most, then, the jury might have speculated as to whether petitioner's retrial was the product of a mistrial or of a reversal of a prior conviction. Indeed, counsel for respondent indicated at oral argument that Georgia has many more retrials occasioned by mistrials than retrials following conviction reversals. Tr. of Oral Arg. 38.

The District Court disagreed and declined to issue the writ. On appeal to the United States Court of Appeals for the Fifth Circuit, the District Court's judgment was affirmed in an opinion holding that the higher sentence received in this case was not violative of due process. 455 F. 2d 640 (1972). Because two other federal courts of appeals had held to the contrary that *Pearce* restrictions are applicable,[6] we granted certiorari to resolve the conflict. 409 U. S. 912 (1972).

II

Georgia is one of a small number of States that entrust the sentencing function in felony cases to the jury rather than to the judge.[7] While much has been written on the questions whether jury sentencing is desirable [8] and whether it is compatible with the modern philosophy of criminal sentencing that "the punishment should fit the offender and not merely the crime," *Williams* v. *New*

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[6] Compare the Fifth Circuit opinion in the instant case (455 F. 2d 640 (1972)), and *Casias* v. *Beto*, 459 F. 2d 54 (CA5 1972), with *Levine* v. *Peyton*, 444 F. 2d 525 (CA4 1971), and *Pendergrass* v. *Neil*, 456 F. 2d 469 (CA6 1972) (pet. for cert. pending, No. 71–1472). State court decisions on this question appear uniformly to hold *Pearce* inapplicable to jury resentencing. See cases discussed in Aplin, Sentence Increases on Retrial After *North Carolina* v. *Pearce*, 39 U. Cin. L. Rev. 427, 430–432 (1970).

[7] Georgia is one of 12 States that provide for jury sentencing in at least some categories of noncapital felony cases. Aplin, *supra*, n. 6, at 429 and n. 10.

[8] See, *e. g.*, Stubbs, Jury Sentencing in Georgia—Time For a Change?, 5 Ga. St. B. J. 421 (1969); Note, Jury Sentencing in Virginia, 53 Va. L. Rev. 968 (1967); President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 145 (1967), and American Bar Association Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures § 1.1 (Approved Draft 1968) (both recommending the abolition of jury sentencing).

York, 337 U. S. 241, 247 (1949), this Court has never expressed doubt about the constitutionality of that practice. See *McGautha* v. *California*, 402 U. S. 183, 196–208 (1971); *Witherspoon* v. *Illinois*, 391 U. S. 510, 519–520 and n. 15 (1968); *Spencer* v. *Texas*, 385 U. S. 554, 560 (1967); *Giaccio* v. *Pennsylvania*, 382 U. S. 399, 405 n. 8 (1966). The States have always enjoyed "wide leeway in dividing responsibility between judge and jury in criminal cases." *Spencer* v. *Texas*, *supra*, at 560. If a State concludes that jury sentencing is preferable because, for instance, it guarantees the maintenance of a "link between contemporary community values and the penal system," *Witherspoon* v. *Illinois*, *supra*, at 519 n. 15, or because "juries are more likely to act with compassion, fairness, and understanding than the judge," Stubbs, Jury Sentencing in Georgia—Time For a Change?, 5 Ga. St. B. J. 421, 426 (1969), nothing in the Due Process Clause of the Fourteenth Amendment intrudes upon that choice.

Petitioner does not question this proposition. Instead, he contends that, although the jury may set the sentence, its range of discretion must be subjected to limitations similar to those imposed when the sentencing function on retrial is performed by the judge. While primary reliance, therefore, is placed on this Court's recent opinion in *Pearce*, petitioner asserts three distinct due process claims: (A) higher sentences on retrial violate the double jeopardy provision of the Fifth Amendment, made binding on the States through the Due Process Clause of the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784, 793–796 (1969); (B) higher sentences occasioned by vindictiveness on the part of the sentencing authority violate traditional concepts of fairness in the criminal process; and (C) the possibility of a higher sentence, even absent a reasonable fear of vindictiveness,

has an impermissible "chilling effect" on the exercise of the rights to appeal and to attack collaterally a conviction. Each claim will be considered separately.

A

The question presented in *Pearce*, arising in the context of judicial resentencing, was framed as follows: "When at the behest of the defendant a criminal conviction has been set aside and a new trial ordered, to what extent does the Constitution limit the imposition of a harsher sentence after conviction upon retrial?" 395 U. S., at 713. In addressing first the double jeopardy claim, the Court recognized the long-accepted power of a State "to *retry* a defendant who has succeeded in getting his first conviction set aside," *id.*, at 720 (emphasis in original); *United States* v. *Tateo*, 377 U. S. 463 (1964), and, as a "corollary" of that power, "to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction." 395 U. S., at 720.

The foundational precedent from which the Court's view of resentencing discretion derives is *Stroud* v. *United States*, 251 U. S. 15 (1919), a case which, because it involved jury resentencing, is central to the double jeopardy claim in the present case. Robert Stroud, popularly known as "The Birdman of Alcatraz," [9] was indicted for the murder of a federal prison guard at Leavenworth, Kansas. After being convicted and sentenced by a jury to life imprisonment, he won a retrial upon a confession of error by the Solicitor General. His retrial resulted in another verdict of guilty of murder in the first degree

[9] See T. Gaddis, Birdman of Alcatraz (1955); R. Stroud, Diseases of Canaries (1935); R. Stroud, Digest on the Diseases of Birds (1939); *Stroud* v. *United States*, 283 F. 2d 137 (CA10 1960), cert. denied, 365 U. S. 864 (1961).

and a sentence, again imposed by the jury, of death. On a direct appeal, a unanimous Court held that despite the harsher sentence on retrial Stroud had not been "placed in second jeopardy within the meaning of the Constitution." *Id.*, at 18.

The Court in *Pearce* reaffirmed that decision, emphasizing that it now constitutes a " 'well-established part of our constitutional jurisprudence' " which rests on the "premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." 395 U. S., at 720–721. Petitioner, relying on the views of MR. JUSTICE DOUGLAS and Mr. Justice Harlan expressed in their separate opinions in *Pearce*, *id.*, at 726, 744, urges the Court to overrule *Stroud*,[10] a step which, for the reasons stated in *Pearce*, we again decline to take.

B

Petitioner's second contention focuses on the problem of vindictiveness. In *Pearce* it was held that vindictiveness, manifesting itself in the form of increased sentences upon conviction after retrial, can have no place in the resentencing process. Under our constitutional system it would be impermissible for the sentencing authority to mete out higher sentences on retrial as punishment for those who successfully exercised their right to appeal, or to attack collaterally their conviction.[11] Those actually subjected to harsher resentencing as a conse-

[10] Brief for Petitioner 9; Tr. of Oral Arg. 40–41.

[11] While there is no *per se* constitutional right to appeal, this Court has frequently held that once a State establishes an appellate forum it must assure access to it upon terms and conditions equally applicable and available to all. *North Carolina* v. *Pearce*, 395 U. S. 711, 724 (1969); *Griffin* v. *Illinois*, 351 U. S. 12 (1956); *Douglas* v. *California*, 372 U. S. 353 (1963); *Rinaldi* v. *Yeager*, 384 U. S. 305 (1966). See also *Johnson* v. *Avery*, 393 U. S. 483 (1969).

quence of such motivation would be most directly injured, but the wrong would extend as well to those who elect not to exercise their rights of appeal because of a legitimate fear of retaliation. Thus, the Court held that fundamental notions of fairness embodied within the concept of due process required that convicted defendants be "freed of apprehension of such a retaliatory motivation." *Id.*, at 725. To that end, the Court concluded that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." *Id.*, at 726. And, as a further prophylaxis, it was stated that those reasons must be based upon "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Ibid.*

Petitioner seeks the extension of the *Pearce* rationale to jury sentencing. That decision, as we have said, was premised on the apparent need to guard against *vindictiveness* in the resentencing process. *Pearce* was not written with a view to protecting against the mere possibility that, once the slate is wiped clean and the prosecution begins anew, a fresh sentence may be higher for some valid reason associated with the need for flexibility and discretion in the sentencing process. The possibility of a higher sentence was recognized and accepted as a legitimate concomitant of the retrial process. *Id.*, at 723.

Subsequent cases have dispelled any doubt that *Pearce* was premised on the hazard of vindictiveness. In *Moon* v. *Maryland*, 398 U. S. 319 (1970), a case granted with a view to determining the retroactivity of *Pearce*, the Court ordered the case dismissed as improvidently granted when it became clear that there was no claim there that the higher sentence received on retrial was

a product of vindictiveness on the part of the sentencing judge. Because counsel for the reconvicted defendant eschewed that contention, the Court held that "there is no claim in this case that the due process standard of *Pearce* was violated." *Id.*, at 320. A similar focus on actual vindictiveness is reflected in the decision last Term in *Colten* v. *Kentucky*, 407 U. S. 104 (1972). The question in that case was whether the *Pearce* principle applied to bar the imposition of a higher sentence after a *de novo* trial in those jurisdictions that employ a two-tier system of trial courts. While noting that "[i]t may often be that the [*de novo* "appeal" court] will impose a punishment more severe than that received from the inferior court," *id.*, at 117, we were shown nothing to persuade us that "the hazard of being *penalized* for seeking a new trial, which underlay the holding of *Pearce*, also inheres in the *de novo* trial arrangement." *Id.*, at 116 (emphasis supplied). In short, the Due Process Clause was not violated because the "possibility of vindictiveness" was not found to inhere in the two-tier system. *Ibid.*

This case, then, is controlled by the inquiry into possible vindictiveness counseled by *Pearce*, *Moon*, and *Colten*. The potential for such abuse of the sentencing process by the jury is, we think, *de minimis* in a properly controlled retrial. The first prerequisite for the imposition of a retaliatory penalty is knowledge of the prior sentence. It has been conceded in this case that the jury was not informed of the prior sentence. We have no reason to suspect that this is not customary in a properly tried jury case. It is more likely that the jury will be aware that there was a prior trial, but it does not follow from this that the jury will know whether that trial was on the same charge, or whether it

resulted in a conviction or mistrial.[12] Other distinguishing factors between jury and judicial sentencing further diminish the possibility of impropriety in jury sentencing. As was true in *Colten*, the second sentence is not meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required a reversal of the conviction. Thus, the jury, unlike the judge who has been reversed, will have no personal stake in the prior conviction and no motivation to engage in self-vindication. Similarly, the jury is unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals.[13]

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[12] See n. 4, *supra*, and accompanying text. See also n. 14, *infra*.

[13] Finally, depending upon the circumstances, it may be a desirable precaution for the trial judge to give the same instructions on the range of punishment at both trials and for the prosecutor to seek the same sentence in each case. See n. 3, *supra*.

It has been suggested that higher sentences on retrial might result from vindictiveness on the part of the prosecutor. As punishment for a successful appeal, for instance, a prosecutor might recommend to the jury, and strenuously argue in favor of, a higher sentence than he previously sought. No such indication exists on this record since the prosecutor vigorously urged the imposition of the death penalty at the first trial. In any event, it would be erroneous to infer a vindictive motive merely from the severity of the sentence recommended by the prosecutor. Prosecutors often request more than they can reasonably expect to get, knowing that the jury will customarily arrive at some compromise sentence. The prosecutor's strategy also might well vary from case to case depending on such factors as his assessment of the jury's reaction to the proof and to the testimony of witnesses for and against the State. Given these practical considerations, and constrained by the bar against his informing the jury of the facts of prior conviction and sentence, the possibility that a harsher sentence will be obtained through prosecutorial malice seems remote. See *Williams* v. *McMann*, 436 F. 2d 103, 105–106 (CA2 1970).

In light of these considerations, and where improper and prejudicial information regarding the prior sentence is withheld,[14] there is no basis for holding that jury resentencing poses any real threat of vindictiveness.[15]

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[14] The State agreed at oral argument that it would be improper to inform the jury of the prior sentence and that *Pearce* might be applied in a case in which, either because of the highly publicized nature of the prior trial or because of some other irregularity, the jury was so informed. Tr. of Oral Arg. 39. We do not decide, however, whether improperly informing the jury would always require limitation of the sentence or whether such error might be cured by careful questioning of the jury venire or by a cautionary jury instruction.

[15] Because we have concluded that jury sentencing is not susceptible of the abuse that prompted the *Pearce* decision, we need not consider what remedy would be required if jury sentencing were subjected to *Pearce*-type restrictions. It is sufficient here to note that because the institution of jury sentencing is unlike judicial sentencing in a number of fundamental ways those restrictions may not be easily invoked. Normally, there would be no way for a jury to place on the record the reasons for its collective sentencing determination, and ordinarily the resentencing jury would not be informed of any conduct of the accused unless relevant to the question of guilt. See Note, *supra*, n. 8, at 978–980; Stubbs, *supra*, n. 8, at 428–429; LaFont, Assessment of Punishment—A Judge or Jury Function?, 38 Tex. L. Rev. 835, 837–842 (1960). These important differences would not be entirely overcome by requiring that jury trials be bifurcated as suggested by the Sixth Circuit in *Pendergrass* v. *Neil*, 456 F. 2d, at 472 (pet. for cert. pending, No. 71–1472). While some jury-sentencing States have adopted bifurcated jury trials, in which the jury assesses the punishment in a separate proceeding after a verdict of guilty has been rendered (see Aplin, *supra*, n. 6, at 430, 441–442; Ga. Code Ann. § 27–2534 (1972)), bifurcation alone would not wipe away the fundamental differences between jury and judicial sentencing. It may make little sense to supply the jury with information about the defendant's conduct if the goal of jury sentencing is not necessarily to fit the punishment to the offender, and if the jury is, therefore, not concerned about matters considered pertinent to judicial sentencing.

Petitioner and recent court of appeals cases suggest that an approximation of the *Pearce* limitations could be realized either by

C

Petitioner's final argument is that harsher sentences on retrial are impermissible because, irrespective of their causes and even conceding that vindictiveness plays no discernible role,[16] they have a "chilling effect" on the convicted defendant's exercise of his right to challenge his first conviction either by direct appeal or collateral attack. What we have said as to *Pearce* demonstrates that it provides no foundation for this claim. To the contrary, the Court there intimated no doubt about the constitutional validity of higher sentences in the absence of vindictiveness despite whatever incidental deterrent effect they might have on the right to appeal. *Colten* likewise represents a view incompatible with petitioner's contention.

Petitioner relies instead on *United States* v. *Jackson*, 390 U. S. 570 (1968), in which the Court held uncon-

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instructing the jury that it may return no verdict higher than the former sentence, or by empowering the judge to reduce the second sentence whenever it exceeds the former sentence. See *Levine* v. *Peyton*, 444 F. 2d 525 (CA4 1971); *Pendergrass* v. *Neil*, *supra*. Although these alternatives would provide an absolute protection from the possibility of vindictiveness, they would also interfere with ordinary sentencing discretion in a manner more intrusive than contemplated by *Pearce*. They would achieve, in the name of due process, the substance of the result we have declined to approve under the Double Jeopardy Clause.

[16] During oral argument, Tr. of Oral Arg. 11–12, petitioner's counsel seemed to concede the absence of an improper motivation on the jury's part:

"Question. Did the jury know anything about the first trial?

"[Petitioner's Counsel]. No, they did not.

. . . . . .

"Question. Was there any possibility of vindictiveness?

"[Petitioner's Counsel]. There is none, obviously not.

"Question. Why not?

"[Petitioner's Counsel]. Because the jury did not know [about] the first sentence."

stitutional the capital punishment provision of the federal antikidnaping law. By limiting to the jury the power to impose a death sentence, the statute "discouraged" the exercise by the accused of his rights to trial by jury and to plead not guilty. *Id.*, at 581. The Court found that the interest of the Government in having the jury retain the power to render the death penalty could be realized without this imposition on the rights of the accused. Therefore, the sentencing structure of the statute was struck down because it "unnecessarily" and "needlessly chill[ed] the exercise of basic constitutional rights." *Id.*, at 582.[17]

Jackson did not hold, as subsequent decisions have made clear, that the Constitution forbids every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights. In *Brady* v. *United States*, 397 U. S. 742 (1970), *Parker* v. *North Carolina*, 397 U. S. 790 (1970), and *North Carolina* v. *Alford*, 400 U. S. 25 (1970), defendants entered pleas of guilty in order to avoid the potential imposition of death sentences by a jury. Each was dissuaded from exercising his rights to a jury trial and to plead not guilty. Each was, in that sense, "discouraged" from asserting his rights, but the Court found no constitutional infirmity despite the claim in each case that *Jackson* compelled a contrary result. *Brady* is particularly instructive. The Court there canvassed several common plea-bargaining circumstances in which the accused is confronted with the "certainty or proba-

[17] In *Brady* v. *United States*, 397 U. S. 742 (1970), the Court succinctly articulated the narrow holding in *Jackson:*

"Because the *legitimate goal* of limiting the death penalty to cases in which a jury recommends it *could be achieved* without penalizing those defendants who plead not guilty and elect a jury trial, the death penalty provision 'needlessly penalize[d] the assertion of a constitutional right.'" *Id.*, at 746 (emphasis supplied).

bility" that, if he determines to exercise his right to plead innocent and to demand a jury trial, he will receive a higher sentence than would have followed a waiver of those rights. 397 U. S., at 751. Although every such circumstance has a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices was upheld as an inevitable attribute of any legitimate system which tolerates and encourages the negotiation of pleas.[18]

Mr. Justice Harlan's opinion for the Court in *Crampton* v. *Ohio,* a companion case to *McGautha* v. *California,* 402 U. S. 183 (1971), deals at some length with the constitutional problems surrounding the imposition of difficult choices in the criminal process and is of particular relevance since it arises in the context of jury sentencing. Petitioner Crampton attacked the Ohio system of conducting capital trials. Ohio allowed the jury to determine guilt and punishment in a single trial and a single verdict, and Crampton complained that due process required a bifurcated trial because in a single trial he could not argue his case for mitigation of punishment to the jury without forgoing his right to remain silent on the issue of guilt. *Id.,* at 220–221. Thus, the free exercise of his Fifth Amendment right to remain silent was "chilled" by the prospect that a harsher jury sentence might ensue.[19] The Court did not agree, however, that the burden imposed on that right was impermissible.

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[18] The legitimacy of the practice of "plea bargaining," as the Court noted last Term in *Santobello* v. *New York,* 404 U. S. 257 (1971), has not been doubted and where "properly administered" it is to be "encouraged" as an "essential" and "desirable" "component of the administration of justice." *Id.,* at 260–261. See also *Brady* v. *United States, supra,* at 751–753.

[19] The case was argued on the theory that the Ohio single proceeding created a "tension between constitutional rights," 402 U. S., at 211, similar to that involved in *Simmons* v. *United States,* 390 U. S. 377 (1968). The Court declined to decide the case in those

In terms pertinent to the case before us today, the Court in *Crampton* stated:

> "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. . . . Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *Id.*, at 213.

Recognizing that the inquiry, by its very nature, must be made on a case-by-case basis, the Court indicated that the "threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." *Ibid.* The choice imposed by the Ohio system was similar to the choice frequently faced by a criminal defendant in deciding whether to assert his right to remain silent. And the fact that the consequence of silence might be a harsher sentence was not regarded as a distinguishing factor.

These cases, we think, erase any question whether *Jackson* might call for abrogation of Georgia's unrestricted jury-resentencing process. Jury sentencing, based on each jury's assessment of the evidence it hears and appraisal of the demeanor and character of the accused, is a legitimate practice. *Supra*, at 21–22. Just as in the guilty-plea cases and *Crampton*, an incidental consequence of that practice [20] is that it

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terms, 402 U. S., at 212–213, but focused instead on the extent to which the lack of a bifurcated proceeding created a burden on the exercise of the right to remain silent, or, stated differently, encouraged its waiver. *Id.*, at 213–217.

[20] We reiterate that we are dealing here only with the case in which jury sentencing is utilized for legitimate purposes and not as a means of punishing or penalizing the assertion of protected rights. *Jackson* and *Pearce* are clear and subsequent cases have not

may require the accused to choose whether to accept the risk of a higher sentence or to waive his rights. We see nothing in the right to appeal or the right to attack collaterally a conviction, even where constitutional errors are claimed, which elevates those rights above the rights to jury trial and to remain silent.

Petitioner was not himself "chilled" in the exercise of his right to appeal by the possibility of a higher sentence on retrial and we doubt that the "chill factor" will often be a deterrent of any significance. Unlike the guilty-plea situation and, to a lesser extent, the nonbifurcated capital trial, the likelihood of actually receiving a harsher sentence is quite remote at the time a convicted defendant begins to weigh the question whether he will appeal. Several contingencies must coalesce. First, his appeal must succeed. Second, it must result in an order remanding the case for retrial rather than dismissing outright. Third, the prosecutor must again make the decision to prosecute and the accused must again select trial by jury rather than securing a bench trial or negotiating a plea.[21] Finally, the jury must again convict

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dulled their force: if the only objective of a state practice is to discourage the assertion of constitutional rights it is "'patently unconstitutional.'" *Shapiro* v. *Thompson*, 394 U. S. 618, 631 (1969).

[21] A footnote in the Court of Appeals opinion indicates that petitioner argued in that court that unrestricted jury resentencing would have an impermissible "chilling effect" on his right to select a jury trial upon retrial. 455 F. 2d, at 641 n. 7. Although this argument is not mentioned in his appellate brief in this Court, petitioner's counsel touched on it briefly at oral argument. Tr. of Oral Arg. 13–14. What we have said here regarding the collective force of *Pearce*, *Colten*, the guilty-plea cases, and *Crampton* should make clear that this claim is without merit. *Jackson* is not to the contrary. Unlike that case, the choice here is subject to considerable speculation. Applying *Pearce*, the judge may or may not give a sentence as high as the jury might give. More importantly, the discouraging effect cannot be said to be "need-

and then ultimately the jury or the judge must arrive at a harsher sentence in circumstances devoid of a genuine likelihood of vindictiveness. While it may not be wholly unrealistic for a convicted defendant to anticipate the occurrence of each of these events,[22] especially in the

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less." 390 U. S., at 583. The parameters of judge- and jury-sentencing power, given the binding nature of *Pearce*, can only be made coterminous by either (1) restricting the jury's power of independent assessment, or (2) requiring jury sentencing in every felony case irrespective whether guilt is determined by a bench trial or a guilty plea after reversal of the conviction. Either alternative would interfere with concededly legitimate state interests, and thus the burden imposed on the right to trial by jury is no less "necessary," *post*, at 44–46, than the burdens tolerated in *Brady* and *Crampton*. Where the burden of the choice is as speculative as this one is, such incursions upon valid state interests are not justified.

[22] In practical terms, as those closest to the criminal appellate process well know (see Hermann, Frivolous Criminal Appeals, 47 N. Y. U. L. Rev. 701 (1972); Carrington, Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law, 82 Harv. L. Rev. 542 (1969)), the likelihood that a convicted defendant will forgo his right to appeal or to attack collaterally his conviction has been diminishing in recent years, in part as a consequence of decisions removing roadblocks and disincentives to appeal. See, *e. g.*, *Griffin* v. *Illinois*, 351 U. S. 12 (1956); *Douglas* v. *California*, 372 U. S. 353 (1963); *Anders* v. *California*, 386 U. S. 738 (1967); *Johnson* v. *Avery*, 393 U. S. 483 (1969); *Younger* v. *Gilmore*, 404 U. S. 15 (1971). Available statistical evidence, from both the federal and state criminal systems, demonstrates that the volume and rate of appeal have risen steadily over the last few years. In a criminal system in which appeal is the rule rather than the exception, the possibility of a higher sentence is a remote consideration. See American Bar Association Project on Standards for Criminal Justice, Criminal Appeals 19–21 (Approved Draft 1970) ("The trend today is clearly toward a much higher rate of appeal"); Administrative Office of the U. S. Courts, 1972 Annual Report of the Director II–11 (direct criminal appeals in 1972 up nearly 25% from 1971); Carrington, *supra*, at 545 (approximately a 200% increase in federal direct criminal appeals from 1959–1960 to 1966–1967).

infrequent case in which his claim for reversal is strong and his first sentence was unusually low, we cannot agree with petitioner that such speculative prospects interfere with the right to make a free choice whether to appeal.

III

Guided by the precedents of this Court, these are the conclusions we reach. The rendition of a higher sentence by a jury upon retrial does not violate the Double Jeopardy Clause. Nor does such a sentence offend the Due Process Clause so long as the jury is not informed of the prior sentence and the second sentence is not otherwise shown to be a product of vindictiveness. The choice occasioned by the possibility of a harsher sentence, even in the case in which the choice may in fact be "difficult," does not place an impermissible burden on the right of a criminal defendant to appeal or attack collaterally his conviction.

Affirmed.

MR. JUSTICE DOUGLAS dissents for the reasons stated in his dissenting opinion in *Moon* v. *Maryland,* 398 U. S. 319, 321 (1970). He also agrees with MR. JUSTICE STEWART and MR. JUSTICE MARSHALL that establishing one rule for resentencing by judges and another for resentencing by juries burdens the defendant's right to choose to be tried by a jury after a successful appeal. *United States* v. *Jackson,* 390 U. S. 570 (1968).

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN joins, dissenting.

In *North Carolina* v. *Pearce,* 395 U. S. 711, 725, the Court held that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." As I see it, there is a real danger of such vin-

dictiveness even when a jury rather than a judge imposes the sentence after retrial. Because the Court today declines to require any procedures to eliminate that danger, even though procedures quite similar to those adopted in *Pearce* could readily be applied without sacrificing the values of jury sentencing, I must dissent.

The true threat of vindictiveness at a retrial where the jury metes out the sentence comes from the trial judge and prosecutor. Either or both might have personal and institutional reasons for desiring to punish a defendant who has successfully challenged his conviction. Out of vindictiveness the prosecutor might well ask for a sentence more severe than that meted out after the first trial, and a judge by the manner in which he charges the jury might influence the jury to impose a higher sentence at the second trial. In the present case, for example, while the petitioner was sentenced to 15 years' imprisonment after his first trial, on retrial the prosecutor asked the jury to impose the death penalty, and the judge instructed the jurors that they could inflict that punishment. It is said that the prosecutor and judge gave the jury the option to impose capital punishment at the retrial simply as a tactical move to assure that the petitioner would again receive at least a 15-year sentence. But it is not inconceivable in this setting that a prosecutor or a judge might seek to secure a higher sentence for a defendant in order to punish him for his successful appeal.*

*The Court finds the possibility of prosecutorial malice "remote." *Ante*, at 27. The only basis for that conclusion appears to be that the prosecutor may have quite innocent strategic reasons for requesting an increased sentence after a retrial. But that does not foreclose the possibility that a prosecutor might have quite vindictive reasons for seeking a more severe penalty, and it underlines the extraordinary difficulty a defendant would have in attempting to prove a retaliatory motivation.

It was to purge that possibility of retaliation that *Pearce* required prophylactic measures for judicial sentencing. Without such procedures, as the Court pointed out in *Pearce,* it would be extremely difficult for a defendant to establish that his higher sentence was the result of a retaliatory motivation.

I agree with the Court today that some measures are ill-suited to eliminating the possibility of retaliation in a case where the jury imposes the sentence. For example, the jury ought not to be told that its sentencing power is limited by the term imposed at the first trial, for the jury might then impose a less severe sentence in reaching a compromise verdict. But there is no reason why the trial judge should not be compelled to reduce any sentence imposed by the jury after retrial to that imposed after the first trial, unless he can affirmatively set forth the kind of reasons required in *Pearce* for the increased sentence. "Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." 395 U. S., at 726.

As in *Pearce,* that procedure would serve to minimize the possibility that vindictiveness had played a role in the sentence a defendant received after a new trial, and it would free a convicted man from the fear that a successful challenge to his conviction might lead to a vindictively imposed harsher sentence after a second trial. Since this measure would, at the most, reinstate the sentence imposed by the original jury, none of the basic purposes served by jury sentencing would be jeopardized.

I also agree with my Brother MARSHALL that allowing a more severe sentence to be imposed by a jury on retrial, when that sentence would be impermissible for a judge to impose, is an infringement upon a defendant's constitutional right to a jury trial. See *United States* v. *Jackson,* 390 U. S. 570. Requiring that a judge reduce a jury-

imposed sentence to that imposed after the first trial, unless he can make the kind of findings required by *Pearce,* would eliminate that illegitimate burden upon a constitutional right.

MR. JUSTICE MARSHALL, dissenting.

I cannot agree with the Court that it is permissible for a jury, but not for a judge, to give a defendant on his retrial a sentence more severe than the one he received in his first trial, without specifying particular aspects of his behavior since the time of his first trial that justify the enhanced sentence. Such a rule is defective in two ways. First, the Court acknowledges that a jury violates the Constitution when it gives such a defendant a more severe sentence to punish him for successfully taking an appeal. *Ante,* at 26–28. Yet, when the costs, in terms of other values served by juries, of the methods of preventing, detecting, and remedying that kind of violation are balanced against the minor degree to which restrictions on jury resentencing impair the values served by jury sentencing, the need to vindicate the constitutional right warrants restrictions on juries similar to those we placed on judges in *North Carolina* v. *Pearce,* 395 U. S. 711 (1969). Second, as in *United States* v. *Jackson,* 390 U. S. 570 (1968), the possibility that a jury might increase a sentence for reasons that would be unavailable to a judge unnecessarily burdens the defendant's right to choose a jury trial. I therefore respectfully dissent.

I begin with what appears to be common ground. If the jury on retrial has been informed of the defendant's prior conviction and sentence, the possibility is real that it will enhance his punishment simply because he successfully appealed. The Court apparently agrees, *ante,* at 27 n. 13, 28–29, nn. 14–15, and suggests that a variety of preventive and remedial measures must be taken to min-

imize that possibility. Those measures, I believe, are too intrusive on the process of selecting the jury and insulating its deliberations from inquiry. In *Pearce* we devised a remedy for judicial vindictiveness in sentencing that was broader than the constitutional vice, because a remedy more closely tailored to the vice would too severely intrude on the process by which the judge made his sentencing decisions. A similar remedy is justified for the same reasons in the case of jury resentencing.

Of course a jury that does not know of a prior conviction and sentence cannot take them into account when it resentences the offender. But there is a real possibility that a jury will know of a prior sentence and will enhance the punishment it imposes out of vindictiveness as the Court apparently concedes in limiting its holding to "properly controlled retrial[s]." *Ante,* at 26. And only when the possibility of vindictiveness can confidently be said to be *de minimis* can *Pearce* be distinguished. Even in *Pearce* we acknowledged the difficulty in establishing that sentences were frequently enhanced out of vindictiveness. 395 U. S., at 725 n. 20. Indeed, we could cite only studies that showed that increased sentences on reconviction were "far from rare," *ibid.;* we had before us no evidence at all that vindictiveness actually played a part in a substantial number of cases where sentences were increased.[1]

[1] I assume that the Court would treat jury sentencing as it treated judge sentencing in *Pearce* if it were presented with the same kind of evidence we drew on in *Pearce.* Cf. *Witherspoon* v. *Illinois,* 391 U. S. 510, 516–518 (1968). Because of the differing institutional positions of judges, who will be repeatedly reviewed by appellate courts, and juries, which are not continuing bodies, cf. *Illinois* v. *Somerville,* 410 U. S. 458, 477 (1973) (MARSHALL, J., dissenting), evidence supporting the inference that vindictiveness may not infrequently influence jury decisions would be especially valuable from cases in which the evidence on retrial was not substantially different from the evidence at the first trial.

Given the possibility of vindictiveness, a defendant is entitled to a remedy designed to eliminate, or at least minimize, that possibility. It follows, I believe, that the defense is entitled to have prospective jurors asked carefully framed questions designed to explore their knowledge of a prior conviction and sentence. Cf. *Ham* v. *South Carolina*, 409 U. S. 524 (1973). But it will inevitably be difficult to frame questions that will do so without informing the jurors of those facts in the very act of questioning them. In addition, the right to have questions asked of prospective jurors would be meaningless unless the defense could challenge jurors for cause solely on the basis of the answers to those questions. Yet nearly all of the States in which jury sentencing is required have large rural areas,[2] where it is quite likely that a retrial after a successful appeal will be a notorious public event. It seems to me probable, then, that the right recognized by the Court will substantially impede expeditious selection of juries, for it will generally be easy to make a threshold showing of local publicity, and may often so severely limit the number of available jurors as to raise serious questions of the representativeness of the jury finally chosen.[3]

The Court suggests that a curative instruction might minimize the possibility that the jury will be improperly influenced by its knowledge of a prior conviction or

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[2] In addition to Georgia, these States include Arkansas, Kentucky, Missouri, Oklahoma, Tennessee, and Virginia.

[3] Even on the Court's analysis, if a defendant must proceed to trial before a jury that knows of his prior conviction and sentence, due process would require limitations on the sentence imposed, though such limitations would not be required in "properly controlled retrial[s]." Thus, the Court does not today endorse the proposition that limitations on jury sentencing on a retrial are *never* required. See *ante*, at 28 n. 14. At most, it holds only that, in the absence of knowledge of the prior conviction and sentence, no limitations are constitutionally compelled.

sentence. *Ante*, at 28 n. 14. We have already recognized, however, that it is quite unrealistic to believe that instructions to disregard evidence that a jury might treat in a manner highly prejudicial to a defendant will often be followed. *Jackson* v. *Denno*, 378 U. S. 368, 388–389 (1964); *Bruton* v. *United States*, 391 U. S. 123, 128–137 (1968). Cf. E. Morgan, Some Problems of Proof Under the Anglo-American System of Litigation 105 (1956). And curative instructions may serve only to highlight the problem. Not every such instruction is ineffective, of course, but I would not burden the judicial process with difficult inquiries into the effectiveness of such an instruction where, as here, the State's interest in having sentences imposed by a jury can easily be satisfied without requiring such inquiries. See *infra*, at 43.

Finally, a post-sentencing inquiry of a jury that imposes a more severe sentence might disclose that vindictiveness played no part in its sentencing decision. But this could be achieved only by sacrificing the traditional secrecy of jury deliberations. Cf. *Clark* v. *United States*, 289 U. S. 1 (1933), and cases cited therein.

Because of the differing institutional positions of judge and jury,[4] and because the jury that sentences also con-

[4] The Court distinguishes *Pearce* from this case in part on the ground that there "the second sentence [was] meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required a reversal of the conviction," while here "the jury, unlike the judge who has been reversed, will have no personal stake in the prior conviction and no motivation to engage in self-vindication." *Ante*, at 27. The Court cannot mean that Pearce himself was resentenced by the same judge who sentenced him in the first place, for Pearce was tried before two different judges. See *State* v. *Pearce*, 266 N. C. 234, 236, 145 S. E. 2d 918, 920 (1966) (Judge Williams at first trial); *State* v. *Pearce*, 268 N. C. 707, 708, 151 S. E. 2d 571, 572 (1966) (Judge McLaughlin at second trial). Thus, the only differences in this respect are institutional, not personal: juries are not continuing bodies and may have little interest in deterring appeals or vindicating a colleague.

victs and so focuses on the facts of the offense, the question of applying the limitations imposed by *Pearce* on resentencing by judges to resentencing by juries would surely be a close one, if only the issue of possible vindictiveness were involved. Since no state interests in jury sentencing would be impaired to any significant degree by imposing such limitations, however, the question should be resolved in favor of limiting the jury's power.

One group of policies underlying jury sentencing derives from the belief that juries will be more humane and compassionate than judges: judges, it is said, represent a centralized government remote from the details of local life; judges who often must seek re-election may be unduly swayed by political considerations that have little impact on jurors; and judges who routinely deal with criminal cases may become callous and insensitive to the human problems of defendants. In contrast, the jury has close ties to the local community, and because it sits only once and then dissolves, its members ordinarily have little experience with criminal offenders. Cf. Note, Jury Sentencing in Virginia, 53 Va. L. Rev. 968, 988–991 (1967). It is somewhat anomalous, however, to contend that because juries are more compassionate than judges, they may impose a sentence more severe than a judge may constitutionally impose. I cannot understand, therefore, how the belief that juries are more compassionate than judges justifies a rule that permits a jury on retrial to impose a sentence more severe than that imposed by the original jury.

The second policy implicated in jury sentencing is that the jury serves as a "link between contemporary community values and the penal system," *Witherspoon* v. *Illinois*, 391 U. S. 510, 519 n. 15 (1968). More accurately than a judge, the jury reflects the community's moral attitude toward the particular offender. The jury's function in sentencing, then, is to make the punishment

fit the crime, not the criminal. Limitations on the sentences a jury might impose do impair its ability to decide what punishment fits the crime before it. But in cases like this one, one jury has already determined what it, as a representative of community views, thinks is an appropriate sentence. Indeed, it has done so after a trial in which reversible error, presumably prejudicial to the defendant, occurred. Thus, this state interest is not substantially impaired by limitations designed to preclude the second jury from imposing a sentence based, in part, on a desire to punish the defendant for taking an appeal.

In short, even if only the question of vindictiveness were involved in the case of jury resentencing, I would hold that limitations similar to those in *Pearce* must be imposed on jury resentencing: alternative methods of minimizing vindictiveness may seriously impair other values, and the limitations of *Pearce* do not greatly affect the values served by jury sentencing.[5] But vindictiveness alone is not the only issue here. For, by establish-

[5] The Court suggests that the limitations of *Pearce* cannot easily be adapted to jury sentencing. *Ante*, at 28–29, n. 15. But procedures like bifurcation, special verdicts stating the reasons for the sentence imposed or stating that the prior conviction and sentence were not taken into account, instructing the jury that the maximum sentence available to it is that imposed earlier, or empowering the judge to reduce the sentence if it exceeds the prior sentence, are some obvious alternatives. The Court suggests that the first two are inconsistent with the basic purpose of jury sentencing—making the punishment fit the crime—and that the latter two "would achieve, in the name of due process, the substance of the result we have declined to approve under the Double Jeopardy Clause." *Ante*, at 29 n. 15. The latter point confuses limitations imposed by the Constitution with choices a State might make to carry out the policies it seeks to vindicate through jury sentencing; if a State chooses to impose a maximum limit on resentencing instead of establishing a bifurcated procedure, for example, the result is not, even in substance, the result urged under the Double Jeopardy Clause, for it results from

ing one rule for sentencing by judges and another for sentencing by juries, the Court places an unnecessary burden on the defendant's right to choose to be tried by a jury after a successful appeal.

We held unconstitutional in *United States* v. *Jackson*, 390 U. S. 570 (1968), a sentencing structure that placed an unnecessary burden on a defendant's right to a jury trial. The Court today purports to distinguish *Jackson* on the ground that subsequent cases show that *Jackson* does not make unconstitutional sentencing structures that impose a burden on the exercise of constitutional rights as "an incidental consequence." *Ante*, at 32. Yet in *Jackson* we said, "The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive." 390 U. S., at 582. *Brady* v. *United States*, 397 U. S. 742 (1970), and *Crampton* v. *Ohio*, 402 U. S. 183 (1971), the cases that the Court now relies on, did not overrule *Jackson;* nor did they change the constitutional test. The question is still whether the burden on the exercise of the right to be tried by a jury is necessary, not whether it is only incidental to the accomplishment of some legitimate state purpose.

In *Brady*, a defendant sought to vacate his guilty plea on the ground that he had pleaded guilty only to avoid capital punishment, under a statute that provided for the death penalty only on the recommendation of the jury. The Court viewed his argument as applicable to

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choice among alternatives and not from constitutional commands. Similarly, bifurcation may inject into jury sentencing considerations that the State thinks are irrelevant to its purposes in establishing a system in which juries are the sentencing authority, and it may decide to adopt some other method of complying with the constitutional requirements. But surely there is no clear conflict between bifurcation or special verdicts and the purposes of jury sentencing.

every kind of inducement that the prosecution offers to a defendant in order to elicit a plea of guilty. See 397 U. S., at 750–753. Thus, on the Court's analysis, upholding his challenge would have necessarily invalidated the widespread practice of plea bargaining, which the Court thought essential to our system of criminal justice. The burden on the exercise of a defendant's right not to incriminate himself was therefore necessary, in the terms of the analysis required by *Jackson*.

Similarly, the defendant in *Crampton* contended that failure to separate the trial of a capital case into a guilt-determining phase and a sentencing phase deterred him from testifying to facts bearing on sentence alone, for to testify would have opened him up to impeachment and to questions bearing on guilt. To the Court, however, such pressure was indistinguishable from that placed on him by a very powerful case for the prosecution that might require rebuttal, or by a large number of other widely accepted procedural rules. See 402 U. S., at 213–216. As in *Brady*, then, the Court could not agree with the defendant without holding unconstitutional many procedures that it thought essential to the criminal process.

Both *Brady* and *Crampton* applied the test of necessity. The Court today does not, as it concedes when it says that "[where] the burden . . . is as speculative as this one is," constitutional limitations on resentencing are not justified. *Ante*, at 34 n. 21. But *Jackson*, *Brady*, and *Crampton* did not involve assessments of the relative severity of the burden on the right to choose to be tried by a jury; [6] they turned on the question of strict

[6] Georgia permits a defendant to plead not guilty and waive his right to jury trial. See *Berry* v. *State*, 61 Ga. App. 315, 6 S. E. 2d 148 (1939). Of the States with jury sentencing, apparently only Kentucky does not permit such a waiver. See *Meyer* v. *Commonwealth*, 472 S. W. 2d 479, 482 (Ky. 1971). Where the prosecution

necessity.[7] No legitimate state interest is materially advanced by permitting a second jury to enhance punishment without limitations like those placed by *Pearce* on judges, and such limitations would not substantially affect any such interest. Thus, the rule endorsed by the Court today is not only unnecessary, but it unquestionably burdens a defendant's choice of jury trial after a successful appeal.[8]

I believe that *Pearce* and *Jackson* require that States with jury sentencing adopt procedures by which juries resentencing an offender are precluded from considering the fact that the offender successfully appealed in determining the new sentence, and so I dissent.

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must agree to such a waiver, cf. Fed. Rule Crim. Proc. 23 (a), it would of course be impermissible to refuse agreement solely because a judge would be restricted in resentencing while a jury would not, cf. *Singer* v. *United States*, 380 U. S. 24, 37 (1965).

[7] In discussing whether the holding today burdens the right to appeal, the Court says that for the undesired outcome to occur, "[s]everal contingencies must coalesce." Thus, "the likelihood of actually receiving a harsher sentence is quite remote at the time a convicted defendant begins to weigh the question whether he will appeal." *Ante*, at 33. But, of the list the Court provides, only two remain contingent when the defendant must decide to waive or insist upon a jury trial—reconviction and sentence. The Court acknowledges that in some cases, even when all the contingencies must be taken into account, the possibility of a harsher sentence might well affect the decision to appeal. *Ante*, at 34–35. The burden will surely be substantial when the contingencies are reduced to two.

[8] The Court, in its footnote discussing this argument, does assert that the burden "cannot be said to be 'needless.'" *Ante*, at 33–34, n. 21. The sentence following that assertion does not supply any reason why the burden is necessary; it simply states two ways in which the burden might be eliminated without saying why those alternatives are so impractical as to make necessary the burden that after today's decision, may be placed on the right to jury trial.

MICHIGAN *v.* PAYNE

CERTIORARI TO THE SUPREME COURT OF MICHIGAN

No. 71–1005. Argued February 22, 1973—Decided May 21, 1973

The "prophylactic" due process limitations established by *North Carolina* v. *Pearce*, 395 U. S. 711, 723–726, to guard against the possibility of vindictiveness in cases where a judge imposes a more severe sentence upon a defendant after a new trial, are not retroactively applicable to resentencing proceedings that, like the one involved in this case, occurred prior to the date of the *Pearce* decision. Pp. 50–57.

386 Mich. 84, 191 N. W. 2d 375, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 58. MARSHALL, J., filed a dissenting opinion, in Part III of which STEWART, J., joined, *post*, p. 59.

John A. Smietanka argued the cause for petitioner. With him on the briefs were *Frank J. Kelley*, Attorney General of Michigan, *Robert A. Derengoski*, Solicitor General, and *Ronald J. Taylor*.

James R. Neuhard argued the cause for respondent. With him on the brief was *Arthur J. Tarnow*.

MR. JUSTICE POWELL delivered the opinion of the Court.

A writ of certiorari was granted in this case, 409 U. S. 911 (1972), to decide whether the due process holding of *North Carolina* v. *Pearce*, 395 U. S. 711, 723–726 (1969), is to be given retroactive effect. For the reasons that follow, we hold today that this decision is nonretroactive.

I

Respondent, Leroy Payne, pleaded guilty in a county circuit court in Michigan to a charge of assault with intent to commit murder in connection with an armed

attack upon two sheriff's deputies. In March 1963 he was sentenced to a prison term of from 19 to 40 years. Several years later, respondent's conviction and sentence were set aside when a hearing, ordered by the Michigan Court of Appeals, disclosed that his confession and subsequent guilty plea were involuntary. Following a retrial, at which he exercised his rights to trial by jury and to plead innocent, respondent again was found guilty on the same assault charge. On August 30, 1967, he was resentenced to prison from 25 to 50 years with full credit for all time served under the prior sentence. During the resentencing hearing, the judge explained that the higher sentence was "based on the nature of the crime and on the impressions which I formed of [respondent] and of the crime."

Respondent appealed to the Michigan Court of Appeals, which affirmed his conviction and approved the higher sentence. 18 Mich. App. 42, 170 N. W. 2d 523 (1969). While the case was pending before the Michigan Supreme Court, the trial judge who had presided over respondent's second trial was requested to submit an affidavit detailing his reasons for imposing a higher sentence. The judge's affidavit stated that his sentencing determination was based primarily on (i) his personal belief that respondent's attitude since the first sentencing proceeding had changed from one of regret to remorselessness, (ii) his view that respondent's alibi defense, given under oath, was a "tissue of lies," and (iii) his heightened opportunity to learn of the details of the crime during the three-day trial.[1]

[1] In his affidavit, the second sentencing judge indicated that a different judge who presided over respondent's prior guilty plea and sentencing hearings did not have as good an opportunity to become fully informed of the details of the "deliberate, cold-blooded attack." In a subsequent amendatory affidavit filed by the same judge, he corrected his prior affidavit by stating that the first judge did

The Michigan Supreme Court, in a 4-to-3 decision, upheld the conviction but rejected the higher sentence as violative of the due process restrictions established in *North Carolina* v. *Pearce, supra.* 386 Mich. 84, 191 N. W. 2d 375 (1971). The court recognized that this Court had not yet decided whether *Pearce* applied to resentencing proceedings which, as in this case, occurred prior to *Pearce*'s date of decision.[2] While declining to predict how the retroactivity question would ultimately be resolved, the Michigan Supreme Court decided to apply *Pearce* to the case then before it "pending clarification" by this Court. *Id.*, at 90 n. 3, 191 N. W. 2d, at 378 n. 2. Before this Court, the State contends that *Pearce* should not be applied retrospectively, but that, even if applicable, the state supreme court erred in holding the higher sentence invalid under the *Pearce* test. Because we hold today that *Pearce* does not apply retroactively, we do not reach the State's second contention.[3]

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have "some limited opportunity to see and hear [respondent] when he testified as a witness for the prosecution against his accomplice" in a separate trial. The parties in this case now agree that the first judge did preside over the trial of respondent's codefendant before sentencing respondent and that respondent did testify at that trial. The parties continue, however, to dispute whether that opportunity was as complete as the opportunity afforded the second judge, and, if not, whether this is a permissible consideration in resentencing under *Pearce*. Because of the manner in which we dispose of this case, we need not resolve this controversy. See n. 3, *infra.*

[2] This Court has twice previously granted certiorari to resolve this question, but on each occasion the writ was dismissed as improvidently granted. *Moon* v. *Maryland,* 398 U. S. 319 (1970) (cert. granted, 395 U. S. 975 (1969)); *Odom* v. *United States,* 400 U. S. 23 (1970) (cert. granted, 399 U. S. 904 (1970)).

[3] This Court has consistently declined to reach out to resolve unsettled questions regarding the scope or meaning of decisions establishing "new" constitutional requirements in cases in which it holds any such decisions nonretroactive. See *Stovall* v. *Denno,* 388 U. S. 293 (1967) (holding *United States* v. *Wade,* 388 U. S. 218 (1967),

II

In *Pearce*, the Court emphasized that "[i]t can hardly be doubted" that, while "there exists no absolute constitutional bar to the imposition of a more severe sentence upon retrial," it would be entirely impermissible for judges to render harsher penalties as punishment for those defendants who have succeeded in getting their convictions reversed. 395 U. S., at 723. "[V]indictiveness" against a defendant for having exercised his rights to appeal or to attack his conviction collaterally, the Court held, "must play no part in the sentence [a defendant] receives after a new trial." *Id.*, at 725. In so holding, the Court recognized that "fundamental notions of fairness embodied within the concept of due process" absolutely preclude the imposition of sentences based upon such a " 'retaliatory motivation.' " *Chaffin* v. *Stynchcombe*, *ante*, at 25. No "new" constitutional rule was thereby established and it cannot be questioned that this basic due process protection ar-

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and *Gilbert* v. *California*, 388 U. S. 263 (1967), nonretroactive without resolving the question whether those cases were applicable to preformal accusation confrontations, a question later decided in *Kirby* v. *Illinois*, 406 U. S. 682 (1972)); *DeStefano* v. *Woods*, 392 U. S. 631 (1968) (holding *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), and *Bloom* v. *Illinois*, 391 U. S. 194 (1968), nonretroactive and declining to decide whether a summary contempt proceeding that results in a one-year sentence is a "serious" offense requiring trial by jury, a question later decided in *Baldwin* v. *New York*, 399 U. S. 66 (1970)); *Carcerano* v. *Gladden* (a companion case with *DeStefano*, in which the Court declined to decide whether the right to jury trial contemplated by *Duncan* also required a unanimous verdict, a question later decided in *Apodaca* v. *Oregon*, 406 U. S. 404 (1972)); *Elkanich* v. *United States* (a companion case with *Williams* v. *United States*, 401 U. S. 646 (1971), holding *Chimel* v. *California*, 395 U. S. 752 (1969), nonretroactive and declining to decide whether the search was otherwise compatible with the *Chimel* limitations on searches incident to lawful arrests).

ticulated in *Pearce* is available equally to defendants resentenced before and after the date of decision in that case. On this point the parties do not disagree.

The dispute in this case centers, instead, around the "prophylactic" [4] limitations *Pearce* established to guard against the possibility of vindictiveness in the resentencing process. Those limitations, applicable "whenever a judge imposes a more severe sentence upon a defendant after a new trial," 395 U. S., at 726, require that the sentencing judge's reasons "must affirmatively appear," and that those reasons "must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Ibid.* The question here is whether these restrictions govern resentencing proceedings predating *Pearce.*

The contours of the retroactivity inquiry have been clearly delineated in numerous decisions over the last decade. The test utilized repeatedly by this Court to ascertain whether "new" constitutional protections in the area of criminal procedure are to be applied retroactively calls for the consideration of three criteria: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno,* 388 U. S. 293, 297 (1967). See also *Linkletter* v. *Walker,* 381 U. S. 618, 629, 636 (1965); *Tehan* v. *Shott,* 382 U. S. 406, 410–418 (1966); *Johnson* v. *New Jersey,* 384 U. S. 719, 726–727 (1966).

The two purposes for the resentencing restrictions imposed by *Pearce* were to ensure (i) "that vindictiveness against a defendant for having successfully attacked his first conviction . . . [would] play no part in the sentence

[4] *Chaffin* v. *Stynchcombe, ante,* at 25; *Colten* v. *Kentucky,* 407 U. S. 104, 116, 118 (1972).

he receives after a new trial . . ." and (ii) that apprehension of such vindictiveness would not "deter a defendant's exercise of the right to appeal or collaterally attack his first conviction. . . ." 395 U. S., at 725; *Colten* v. *Kentucky*, 407 U. S. 104, 116 (1972). The latter purpose is not pertinent to this case, since respondent was not deterred from exercising his right to challenge his first conviction. But, in any event, we think it clear that this function of the new resentencing rules could be served only *in futuro:* nothing in *Pearce* suggests that the Court contemplated that its decision might provide a ground for the untimely reopening of appeals by defendants who decided not to appeal prior to the date of decision in *Pearce*.[5] See *James* v. *Copinger*, 441 F. 2d 23 (CA4 1971).

The first-articulated purpose of the *Pearce* rules—to protect against the possibility that actual vindictiveness will infect a resentencing proceeding—deserves closer scrutiny. Unlike the purposes underlying many of the decisions heretofore accorded retrospective application,[6] this purpose does not implicate the " 'fair determination' of . . . *guilt or innocence.*" *Roberts* v. *Russell*, 392 U. S. 293, 294 (1968) (emphasis supplied). It does, however, involve questions touching on the "integrity" of one aspect of the judicial process. *McConnell* v. *Rhay*, 393 U. S. 2, 3 (1968). The *Pearce* restrictions serve to ensure

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[5] This is not to suggest, of course, that there may not be specific cases in which a convicted defendant might show that his initial waiver of his right to appeal was involuntary because caused by a reasonably based fear of actual vindictiveness on the part of a particular judge. Cf. *North Carolina* v. *Pearce*, 395 U. S., at 725 n. 20.

[6] See, *e. g.*, *In re Winship*, 397 U. S. 358 (1970) (held retroactive in *Ivan V.* v. *New York*, 407 U. S. 203 (1972)); *Barber* v. *Page*, 390 U. S. 719 (1968) (held retroactive in *Berger* v. *California*, 393 U. S. 314 (1969)); *Bruton* v. *United States*, 391 U. S. 123 (1968) (held retroactive in *Roberts* v. *Russell*, 392 U. S. 293 (1968)); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963).

that resentencing decisions will not be based on improper considerations, such as a judge's unarticulated resentment at having been reversed on appeal, or his subjective institutional interest in discouraging meritless appeals. By eliminating the possibility that these factors might occasion enhanced sentences, the *Pearce* prophylactic rules assist in guaranteeing the propriety of the sentencing phase of the criminal process. In this protective role, *Pearce* is analogous to *Miranda* v. *Arizona,* 384 U. S. 436 (1966), in which the Court established rules to govern police practices during custodial interrogations in order to safeguard the rights of the accused and to assure the reliability of statements made during those interrogations. Thus, the prophylactic rules in *Pearce* and *Miranda* are similar in that each was designed to preserve the integrity of a phase of the criminal process. Because of this similarity, we find that *Johnson* v. *New Jersey,* 384 U. S. 719 (1966), which held *Miranda* nonretroactive, provides considerable guidance here. See also *Jenkins* v. *Delaware,* 395 U. S. 213 (1969).

It is an inherent attribute of prophylactic constitutional rules, such as those established in *Miranda* and *Pearce,* that their retrospective application will occasion windfall benefits for some defendants who have suffered no constitutional deprivation. *Miranda*'s well-known warning requirements provided a protection "against the possibility of unreliable statements in *every* instance of in-custody interrogation," and thereby covered many "situations in which the danger [was] not necessarily as great as when the accused is subjected to overt and obvious coercion." *Johnson* v. *New Jersey, supra,* at 730 (emphasis supplied). Thus, had *Miranda* been applied retroactively, it would have required the reversal of many convictions in which no serious constitutional violation had occurred. *Id.,* at 731. Likewise, the retroactive application of *Pearce* would require the repudiation

of many sentences rendered under circumstances in which there was no genuine possibility that vindictiveness played a role. Judicial impropriety in the resentencing process, albeit intolerable wherever it happens, surely is not a common practice. Indeed, nothing in *Pearce* intimates that the Court regarded it as anything more than an infrequently appearing blemish on the sentencing process.[7] Absent countervailing considerations rooted in the purposes underlying a new rule, this factor—that retroactive application of such broadly protective rules would occasion reversals in many instances in which no actual prejudice has been suffered—points toward a ruling of prospectivity.

Nonretroactivity is also suggested by the second similarity between *Miranda* and *Pearce*. While each created a protective umbrella serving to enhance a constitutional guarantee, neither conferred a constitutional right that had not existed prior to those decisions. The right against use of an involuntary confession long preceded *Miranda* just as the right to be free from fundamentally unfair sentencing considerations predated *Pearce*. *Supra*, at 50. Because these foundational rights remain available to defendants in pre-*Miranda* and pre-*Pearce* cases, a decision of nonretroactivity is less likely to result in the continued incarceration of those whose convictions or sentences rest on unconstitutional acts.[8] *Linkletter* v. *Walker*, 381 U. S., at 640 (Black, J., dissenting).

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[7] The most that may be said is that the Court in *Pearce* found that "increased sentences on reconviction are far from rare," 395 U. S., at 725 n. 20, and that it was persuaded that vindictiveness played a role in a sufficient number of those cases to "warrant the imposition of a prophylactic rule." *Colten* v. *Kentucky*, 407 U. S., at 116.

[8] See *Johnson* v. *New Jersey*, 384 U. S. 719 (1966). See also *Stovall* v. *Denno*, 388 U. S., at 299 (in pre-*Wade-Gilbert* cases "it remains open to all persons to allege and prove . . . that the confrontation . . . infringed his right to due process of law"); cf. *Halliday* v. *United States*, 394 U. S. 831, 833 (1969).

Of course, the question of the impact of particular decisions on the reliability and fairness of any aspect of a criminal proceeding is inherently a matter of balancing "probabilities." *Johnson* v. *New Jersey*, 384 U. S., at 729; *Adams* v. *Illinois*, 405 U. S. 278, 281 (1972). Yet in view of the fact that, if retroactive, *Pearce* would apply to innumerable cases in which no hint of vindictiveness appears, coupled with the consideration that due process claims may always be made in those prior cases in which some evidence of retaliatory motivation exists,[9] we have little doubt that the "probabilities" in this case preponderate in favor of a ruling of nonretroactivity.[10]

Although the remaining factors—reliance and burden on the administration of justice—have been regarded as having controlling significance "only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity," *Desist* v. *United States*, 394 U. S. 244, 251 (1969), those considerations also support the nonretroactivity of *Pearce*. The result in *Pearce* was not "foreshadowed" by any prior decision of this Court.[11] Indeed, prior to *Pearce*, resentencing judges were bound by no requirement that they articulate their reasons and

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[9] Of course, it remains true that "retaliatory motivation" may be "difficult to prove in any individual case." *North Carolina* v. *Pearce*, 395 U. S., at 725 n. 20. And, this is certainly one of the reasons why the Court in *Pearce* adopted prophylactic rules. Similar problems of proof prompted the decisions in *Miranda* and *Wade*, but such problems in themselves were not sufficient to warrant retrospective application.

[10] We reiterate here what the Court has repeatedly said in retroactivity cases: "[W]e do not disparage a constitutional guarantee in any manner by declining to apply it retroactively." *Johnson* v. *New Jersey*, 384 U. S., at 728; cf. *Linkletter* v. *Walker*, 381 U. S. 618, 629 (1965).

[11] Compare *Berger* v. *California*, 393 U. S. 314 (1969), and *Roberts* v. *Russell*, 392 U. S. 293 (1968), with *Adams* v. *Illinois*, 405 U. S. 278 (1972), and *Johnson* v. *New Jersey*, *supra*, at 731.

generally enjoyed a wide discretion in terms of the factors they might legitimately consider. See *Williams* v. *New York*, 337 U. S. 241 (1949). Nor could it be said that the Court's decision was clearly forecast by any trend of lower court decisions. In *Pearce* itself the Court noted that lower federal and state courts were divided on all of the questions posed. 395 U. S., at 715 n. 5. Under these circumstances, judicial reliance on prior law was certainly justifiable.[12]

Because of that reliance, it is fair to assume that in prior years few, if any, judges complied during resentencing with *Pearce*'s recordation requirement, and that they often considered a variety of factors relating to the defendant and his crime which might or might not have fallen within the *Pearce* standard. We have been presented with no statistical indications as to how many persons received increased penalties after retrials.[13] We cannot say, however, that the potential interference with the administration of justice would be insubstantial if *Pearce* were applied retroactively. In order to comply with *Pearce*, a resentencing judge—assuming he is still on the bench or otherwise available—would be required to make a factual determination as to the reasons for sentences he may have meted out years in the past.

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[12] We need not disagree with MR. JUSTICE MARSHALL'S notation, *post*, at 66 n. 9, that the *result* in *Pearce* was foreshadowed, *i. e.*, that higher sentences on retrial were being questioned. Our focus here, however, is on the prophylactic measure adopted to achieve that result. As to this, we do not think there is any serious question that neither the recordation requirement nor the limitations on matters to be considered were so clearly forecast as to render a contrary state reliance unjustifiable.

[13] See Note, Constitutional Law: Increased Sentence and Denial of Credit on Retrial Sustained under Traditional Waiver Theory, 1965 Duke L. J. 395, 399 n. 25 (informal survey of North Carolina courts showed that six of 50 reconvicted defendants received higher sentences).

Compliance with that requirement would present considerable difficulties, since judges, like witnesses in criminal trials, lack infallible memories and perfect records of their motivations.[14] *Linkletter* v. *Walker,* 381 U. S., at 637. While we would not shy from imposing these burdens were we persuaded that it was necessary to do so in order to effectuate the purposes underlying *Pearce,* we have found no such need here. In sum, upon application of the three-part test, we hold that the *Pearce* requirements are not to be accorded retroactive application.[15]

III

Since the resentencing hearing in this case took place approximately two years before *Pearce* was decided, we hold that the Michigan Supreme Court erred in applying its proscriptions here. Accordingly, the judgment of that court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[14] Thus, the retroactivity of *Pearce* would present difficulties not encountered in two of the Court's recent decisions holding retroactive cases involving resentencing: *Furman* v. *Georgia,* 408 U. S. 238 (1972) (the "death penalty" case); *Robinson* v. *Neil,* 409 U. S. 505 (1973) (holding *Waller* v. *Florida,* 397 U. S. 387 (1970) retroactive). In both cases, "[t]hat which was constitutionally invalid could be isolated and excised without requiring the State to begin the entire factfinding process anew." *Robinson* v. *Neil, supra,* at 510.

[15] Respondent, relying on *Linkletter* v. *Walker, supra,* and *Tehan* v. *Shott,* 382 U. S. 406 (1966), urges the Court to distinguish between cases, like his, on direct appeal and those arising after a conviction and sentence have become final. We think the above-stated reasons for applying *Pearce* prospectively apply with equal force to all cases in which resentencing proceedings occurred before June 23, 1969, the date of decision in *Pearce.* See *Stovall* v. *Denno,* 388 U. S., at 300; *Desist* v. *United States,* 394 U. S., at 252; *Williams* v. *United States,* 401 U. S., at 651–652.

MR. JUSTICE DOUGLAS, dissenting.

We deal here with the guarantee contained in the Fifth Amendment, applicable to the States by reason of the Fourteenth, *Benton* v. *Maryland,* 395 U. S. 784, that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." The construction given that clause was applied retroactively in *North Carolina* v. *Pearce,* 395 U. S. 711; and I think that Payne as well as Pearce should have the benefit of the "new" constitutional rule. My views have been at odds with those of the Court as witnessed by the dissent of Mr. Justice Black in *Linkletter* v. *Walker,* 381 U. S. 618, 640, which I joined, and by my separate dissent in *Desist* v. *United States,* 394 U. S. 244, 255. I could understand making a "new" constitutional rule applicable only prospectively. But I cannot bring myself to making the "new" rule applicable to some but not to others. If a State has violated the Federal Constitution in convicting or sentencing a prisoner, I see no way of denying him relief from that unconstitutional trial or unconstitutional sentence.

The Double Jeopardy Clause in my view was designed to discourage the abusive use by the Executive and Judicial Branches of the awesome power of government over the individual. Jeopardy attaches once the trial starts. If there is error in that trial and as a result a new trial is had, the Government cannot impose an added or increased sentence on the second trial. That is my view, as explained in *North Carolina* v. *Pearce, supra,* at 726–737. Respondent received a sentence of 19 to 40 years on his first trial and a greater one of 25 to 50 years on his second trial. I therefore would affirm the judgment below.

MR. JUSTICE MARSHALL, dissenting.

The Court today holds that no limitations need be placed on resentencings that occurred before the date of decision in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969). I believe however, that the State has an obligation to present to the court reviewing the second conviction evidence from which that court can determine whether a new sentence, more severe than that imposed at a prior trial, resulted in part from the sentencing authority's desire to punish the defendant for successfully appealing his first conviction.[1] I therefore respectfully dissent.

I

This case raises the issue of retroactivity only because of the almost unbelievable sluggishness of the appellate process in Michigan. Payne's second sentence was imposed on August 30, 1967, nearly two years before *Pearce* was decided. However, the Michigan Court of Appeals did not decide Payne's appeal until July 28, 1969, one month after the decision in *Pearce*. The Michigan Supreme Court considered the case for two more years, finally deciding it on November 9, 1971. Had the appellate process in Michigan been at all expeditious, this Court might have used Payne's case as the vehicle to de-

[1] The State did present an affidavit from the sentencing judge in this case. The Michigan Supreme Court held that it did not satisfy the requirement of *North Carolina* v. *Pearce*, 395 U. S. 711, 726 (1969), that more severe sentences can be justified only by "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." See 386 Mich. 84, 97, 191 N. W. 2d 375, 381 (1971). Petitioner contends that this holding was erroneous. Petition for Writ of Certiorari 5–6. The Court does not address this contention, nor shall I.

cide that harsher sentences on reconviction could be justified only by objective evidence of post-sentencing conduct by the defendant, the rule adopted in *Pearce*. The only difference between Pearce's case and Payne's, then, is that the former moved up to this Court more quickly than the latter. Different treatment of two cases is justified under our Constitution only when the cases differ in some respect relevant to the different treatment.[2] And a difference in the speed with which a judicial system disposes of an appeal is not related in any way to the purposes served by the limitations that *Pearce* placed on resentencing. Thus, considerations of fairness rooted in the Constitution lead me to conclude that cases in the pipeline when a new constitutional rule is announced must be given the benefit of that rule.

The rule adopted by the Court today is curious in another way. The Court appears to say that a defendant who failed to appeal his first conviction out of "a reasonably based fear of actual vindictiveness," *ante*, at 52 n. 5, is entitled to review of his conviction. Cf. *Fay* v. *Noia*, 372 U. S. 391, 396–397, n. 3 (1963).[3] If his appeal is successful, his new trial will occur after the date of decision in *Pearce*. Thus, any new sentence will be

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[2] Since Payne's appeal was pending when *Pearce* was decided, I need not consider whether different considerations, such as the defendant's failure to raise the issue in seeking review from this Court or to persuade us on the merits, might suffice under the Due Process Clause to justify different treatment of defendants whose sentences had become final.

[3] Mr. Justice Harlan, dissenting in *Fay* v. *Noia*, 372 U. S. 391, 475 (1963), suggested that the possibility of an enhanced sentence after a successful appeal, according to the Court, precluded the State from relying on a failure to appeal as an adequate state ground supporting the denial of relief under federal habeas corpus. On his interpretation, then, *Fay* anticipated the holding in *Pearce*.

subject to the limitations imposed by *Pearce*. The rather strange result is that someone like Payne, who adhered to state procedural rules for vindicating his right to an error-free trial, may receive an enhanced sentence without limitation, while someone who did not adhere to those rules may not have his sentence increased unless the requirements of *Pearce* are met. I suppose that anomalies are occasionally inevitable, but I submit that we should consider very carefully any rule of retroactivity that has the effect of penalizing *compliance* with state procedural rules.

II

The Court applies the now-familiar three-pronged test to determine whether *Pearce* should be given retroactive effect, and it reaches the now-familiar result of nonretroactivity.[4] I believe that principled adjudication requires the Court to abandon the charade of carefully balancing countervailing considerations when deciding the question of retroactivity. Inspecting the cases dealing with retroactivity, I find that they appear to fall into three groups. In some cases, this Court has held that the trial court lacked jurisdiction in the traditional sense. See, *e. g.*, *Benton* v. *Maryland*, 395 U. S. 784 (1969); *Waller* v. *Florida*, 397 U. S. 387 (1970). Those holdings have been made fully retroactive. *Ashe* v. *Swenson*, 397 U. S. 436 (1970); *Robinson* v. *Neil*, 409 U. S. 505 (1973). Cf. *United States* v. *U. S. Coin & Currency*, 401 U. S. 715 (1971). In other cases the Court announced a rule that was central to the process of determining guilt or innocence, and whose application might well have led to the

[4] In holding various rulings retroactive, this Court has given only the most cursory nod to the three-pronged test. See, *e. g.*, *Roberts* v. *Russell*, 392 U. S. 293 (1968); *McConnell* v. *Rhay*, 393 U. S. 2 (1968); *Arsenault* v. *Massachusetts*, 393 U. S. 5 (1968).

acquittal of the defendant. See, *e. g., Gideon* v. *Wainwright,* 372 U. S. 335 (1963); *In re Winship,* 397 U. S. 358 (1970). Those holdings too have been given retroactive effect. *Pickelsimer* v. *Wainwright,* 375 U. S. 2 (1963); *Ivan V.* v. *New York,* 407 U. S. 203 (1972). Cf. *Adams* v. *Illinois,* 405 U. S. 278 (1972). All other constitutional rules of criminal procedure have been given prospective effect only.[5]

I confess that I have been unable to discover a principled basis for that threefold classification, but it does appear to be the factor operating in our cases. And I see little point in forcing lower courts to flounder without substantial guidance in the morass of our cases, by informing them that they are to apply a balancing test, when in fact it invariably occurs that the balancing test results in holdings of nonretroactivity. Furthermore, it demeans this Court to pretend to consider a variety of factors if, no matter how those factors are arrayed, the result is predetermined. An open-minded examination of this Court's cases on retroactivity compels the conclusion that the Court divides cases into several classes, and it is the classification, not the three-pronged test, that determines the result. Our time would be better spent, I think, in attempting to delineate the basis for those classifications, and to derive them from some constitutional principles, rather than in "applying" a balancing test. Indeed, it might have been thought that

[5] *Linkletter* v. *Walker,* 381 U. S. 618 (1965), giving a limited retroactive effect to *Mapp* v. *Ohio,* 367 U. S. 643 (1961), is an anomaly at odds with the Court's subsequent treatment of problems of retroactivity and can be explained only by the Court's unfamiliarity with those problems when the case was decided. See also *Johnson* v. *New Jersey,* 384 U. S. 719 (1966).

Robinson v. *Neil, supra,* had begun the task of rationalizing our cases, but apparently that is not so.

III

The holding of *Pearce* is a simple one: the Due Process Clause requires States to adopt procedures designed to minimize the possibility that a new sentence after a successful appeal will be based in part on vindictiveness for the defendant's having taken the appeal. The Court agrees that "this basic due process protection . . . is available equally to defendants resentenced before and after the date of decision in that case." *Ante,* at 50, 51. The question then is what procedures are required to insure that that protection has been afforded defendants resentenced before *Pearce* was decided. This question, like many of those involving retroactivity, relates to the integrity of the judicial process, not to the limitations placed by the Constitution on police behavior. One can agree that the precise requirements of *Pearce* are inappropriate for retrospective application, largely because they are procedurally ill-adapted to the problem, yet disagree with the Court that the States need do nothing at all to convince a reviewing court that vindictiveness played no part in the resentencing. See, *e. g., Commonwealth* v. *Allen,* 443 Pa. 96, 102, 277 A. 2d 803 (1971).

The issue need not be framed as the "retroactivity" of *Pearce.* The problem, as I see it, is to devise procedures that will permit reviewing courts to determine whether the requirements of the Due Process Clause have been met. In *Pearce* we concluded that it would be enough for a judge, on resentencing a defendant, to state his reasons for imposing a more severe sentence. If the more severe sentence was based upon objective information, placed on the record, concerning the conduct of the

defendant after the first sentencing, the more severe sentence was permissible. Such a rule, although not absolutely guaranteeing that vindictiveness will play no part,[6] nonetheless substantially reduces the possibility that it will, without significantly interfering with the judge's lawful discretion.

A rather similar procedure would accomplish the same result for defendants resentenced before *Pearce* was decided. If a defendant did receive a harsher sentence after a successful appeal, and he seeks to have it reduced to the original sentence, the State should be required to present evidence that the new sentence was based on post-sentence conduct. In the absence of such evidence, the sentence must be reduced.[7] The Court suggests that such a procedure would "occasion windfall benefits for some defendants who have suffered no constitutional deprivation." *Ante,* at 53. That assertion must be considered more closely.

As the Court notes, there is little evidence that more severe sentences are often imposed. It cites an informal survey suggesting that 12% of reconvicted defendants receive higher sentences. *Ante,* at 56 n. 13. Even if that estimate is only half as large as the actual figure for pre-*Pearce* cases, still there are clearly very few defendants who have received harsher sentences. With respect

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[6] For example, the sentencing judge, had he considered the case as an initial matter, might have imposed a sentence shorter than that imposed at the first trial, but, out of vindictiveness, he might decide to reimpose the original sentence. The procedures outlined in *Pearce* cannot prevent this.

[7] I assume that the Court's reliance on the continuing availability of the "foundational" right means that an offender who shows that vindictiveness played a part in his resentencing is entitled to relief. I would simply shift the burden of proof to the State, which has better access to the relevant facts.

to many of them, it will not be difficult to produce evidence supporting the new sentence. As in *Moon* v. *Maryland*, 398 U. S. 319 (1970), and *Odom* v. *United States*, 400 U. S. 23 (1970), the sentencing judge might indicate by affidavit or order the grounds for his sentencing decision. If memories have faded, the State might show that a presentence report considered by the judge recited post-sentence conduct by the defendant that would justify the harsher sentence.

Thus, I do not think that it can fairly be said that the requirements I would impose would in fact result in windfall benefits to "innumerable" defendants, *ante*, at 55; they would accrue to those few defendants who were convicted, successfully appealed, were reconvicted, and received harsher sentences so long ago that the State cannot produce evidence from which a reviewing court could find that vindictiveness played no part in the sentencing decision.[8] And the "windfall benefits" would impair no substantial state interest in incarcerating those few offenders. Unlike the suppression of probative evidence that might severely limit the State's ability to secure a conviction of a person who undoubtedly committed an offense, here the remedy is simply the reduction of sentence. *North Carolina* v. *Rice*, 404 U. S. 244, 247 (1971). The sentence to be served would be one that had already been found appropriate by one

[8] State courts, closer to the problems of administering the rule I suggest, have widely thought that those burdens are not substantial. See, *e. g.*, *Stonom* v. *Wainwright*, 235 So. 2d 545 (Fla. App. 1970); *People* v. *Baze*, 43 Ill. 2d 298, 253 N. E. 2d 392 (1969); *State* v. *Pilcher*, 171 N. W. 2d 251 (Iowa 1969); *Hord* v. *Commonwealth*, 450 S. W. 2d 530 (Ky. 1970); *State* v. *Rentschler*, 444 S. W. 2d 453 (Mo. 1969); *Commonwealth* v. *Allen*, 443 Pa. 96, 277 A. 2d 803 (1971); *Denny* v. *State*, 47 Wis. 2d 541, 178 N. W. 2d 38 (1970).

judge, and would therefore satisfy the various interests advanced by incarceration.[9]

For these reasons, I dissent.

MR. JUSTICE STEWART joins Part III of this opinion.

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[9] The Court's conclusion that *Pearce* was not foreshadowed by decisions in this Court or by a trend of lower court decisions is somewhat misleading. This Court's decision in *Green* v. *United States*, 355 U. S. 184 (1957), raised substantial questions under the Double Jeopardy Clause of the constitutionality of enhanced sentences after a successful appeal. Also, one reading of *Fay* v. *Noia*, 372 U. S. 391 (1963), suggested by the dissent of Mr. Justice Harlan, is that a State may not burden the right to appeal with the possibility of an enhanced sentence. And prior to *Pearce*, the First, Second, Fourth, Fifth, and Seventh Circuits had held that enhanced sentences after reconviction could be justified only in limited circumstances. See *Marano* v. *United States*, 374 F. 2d 583 (CA1 1967); *United States* v. *Coke*, 404 F. 2d 836 (CA2 1968) (en banc); *Patton* v. *North Carolina*, 381 F. 2d 636 (CA4 1967); *Simpson* v. *Rice*, 396 F. 2d 499 (CA5 1968); *United States* v. *White*, 382 F. 2d 445 (CA7 1967). So had the California Supreme Court, in a powerful opinion by Justice Traynor. *People* v. *Henderson*, 60 Cal. 2d 482, 386 P. 2d 677 (1963). Finally, a "learned and effective article," as Judge Friendly called it in *United States* v. *Coke*, *supra*, arguing the same point, appeared in 1965. Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant, 74 Yale L. J. 606 (1965). I would think that these decisions and commentary had prepared the ground rather well for *Pearce*, as the Court concedes, *ante*, at 56 n. 12. Yet if the result was foreshadowed, it is not unreasonable to require States *now* to supplement the record, so that it will be clear that unconstitutional sentences were not imposed. Because it insists on treating the issue here as a question of retroactivity, the Court does not address this argument.

Syllabus

NATIONAL LABOR RELATIONS BOARD *v.* BOEING CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71–1607. Argued March 26, 1973—Decided May 21, 1973

The adjudication by the National Labor Relations Board (NLRB) under § 8 (b) (1) (A) of the National Labor Relations Act of an unfair labor practice allegedly committed by a union does not include authority to determine whether the amount of a disciplinary fine levied by the union against a member is reasonable, the issue being one of internal union affairs over which the NLRB exercises no jurisdiction. Pp. 71–78.

148 U. S. App. D. C. 119, 459 F. 2d 1143, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, and POWELL, JJ., joined. BURGER, C. J., filed a dissenting opinion, *post*, p. 78. DOUGLAS, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN, J., joined, *post*, p. 79.

Norton J. Come argued the cause for petitioner. With him on the brief were *Solicitor General Griswold, Peter G. Nash,* and *Patrick Hardin.*

Samuel Lang argued the cause for respondent Boeing Co. With him on the brief were *C. Dale Stout* and *Frederick A. Kullman. Bernard Dunau* argued the cause for respondent Booster Lodge No. 405, International Association of Machinists & Aerospace Workers, AFL–CIO. With him on the briefs were *Plato E. Papps, Louis P. Poulton,* and *C. Paul Barker.**

**J. Albert Woll, Laurence Gold,* and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal.

Milton Smith, Gerard C. Smetana, and *Jerry Kronenberg* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging affirmance.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented in this case is whether the National Labor Relations Board is required by § 8 (b) (1)(A) of the National Labor Relations Act [1] to inquire into the reasonableness of a disciplinary fine imposed by a union upon a member when the Board exercises its admitted authority under that section to determine whether the fine otherwise constitutes an unfair labor practice. The Board held that the validity of union fines under the Act does not depend on their being reasonable in amount. *Booster Lodge No. 405,* 185 N. L. R. B. 380, 383 n. 16, 75 L. R. R. M. 1004, 1007 n. 16 (1970). On petition for judicial review of this determination, the Court of Appeals held that an unreasonably large fine is coercive and restraining within the meaning of § 8 (b)(1)(A), and remanded the case to the Board with directions to consider "questions relating to the reasonableness of the fines imposed by the Union." *Booster Lodge No. 405, International Association of Machinists* v. *NLRB,* 148 U. S. App. D. C. 119, 137, 459 F. 2d 1143, 1161 (1972). We granted certiorari, 409 U. S. 1074 (1972), and now reverse the judgment below.

From May 16, 1963, through September 15, 1965, Booster Lodge No. 405, International Association of Machinists & Aerospace Workers, AFL–CIO (the Union), and the Boeing Co. (the Company) were parties to a collective-bargaining agreement. Upon expiration of this agreement the Union called a lawful economic strike at the Company's

[1] "(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ." 61 Stat. 141, 29 U. S. C. § 158 (b)(1)(A).

Michoud plant in New Orleans and at other locations. As of October 2, 1965, the parties signed a new collective-bargaining agreement and the strikers thereafter returned to work. Both agreements contained maintenance-of-membership clauses that required Union members to retain their membership during the contract term. New employees were required to notify the Union and the Company within 40 days of accepting employment if they elected not to join the Union.

During the 18-day strike some 143 employees out of 1,900 production and maintenance employees in the bargaining unit at the Michoud plant crossed the picket lines and returned to work. All of these employees were Union members at the time the strike began, although some of them tendered their resignations either before or after crossing the picket lines.[2] In late October or early November 1965 the Union notified these employees that charges had been preferred against them for violating the International Union's constitution. The constitution provides penalties for the "improper conduct of a member," which term includes "[a]ccepting employment . . . in an establishment where a strike . . . exists." In accordance with appropriate union procedures, including notice and opportunity for a hearing, all strike-breakers were found guilty, fined $450, and barred from holding Union office for a period of five years.[3] While

[2] Of the 143 employees who crossed the picket lines, 24 made no attempt to resign from the Union, 61 resigned before crossing the picket lines, and 58 resigned after crossing the picket lines and reporting for work. The validity of the fines imposed against those who resigned from the Union is considered in a companion case, *Machinists & Aerospace Workers* v. *NLRB, post,* p. 84. See also *NLRB* v. *Textile Workers,* 409 U. S. 213 (1972).

[3] The Union constitution provides that members found guilty of misconduct after notice and a hearing are subject to "reprimand, fine, suspension, or expulsion from membership or any lesser penalty

some of the fines were reduced and some partial payments were received by the Union, no member paid the full $450.[4] After warning members to pay their fines or face the consequences, the Union filed suits in state court against nine individual employees to collect the fines. None of these suits has been finally adjudicated.

In February 1966 the Company filed a charge with the Labor Board alleging that the attempted court enforcement of the fines violated § 8 (b)(1)(A) of the National Labor Relations Act. The allegations were basically twofold: first, that the Union committed an unfair labor practice by fining employees who had resigned from the Union, an issue that we consider in the companion case, *Machinists & Aerospace Workers* v. *NLRB*, *post*, p. 84; and, second, that as to the members who were otherwise validly fined, the fines were unreasonable in amount. Thereafter the Board's General Counsel issued a complaint and the case was heard by a Trial Examiner. With respect to the second issue, the Trial Examiner determined that the fines were impermissibly excessive, but the Board refused to adopt his conclusion. It relied on a case decided the same day, *Machinists, Local Lodge 504 (Arrow Development Co.)*, 185 N. L. R. B. 365, 75 L. R. R. M. 1008 (1970), reversed *sub nom. O'Reilly* v. *NLRB*, 472 F. 2d 426 (CA9 1972), in which it held that Congress did not intend to give the Board authority to regulate the size of union fines or to establish standards with respect to a fine's reasonableness.

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or combination." The constitution sets no maximum dollar limitation on fines.

[4] The base income of the employees fined ranges from $95 to $145 for a 40-hour workweek.

Fines were reduced to 50% of wages earned during the strike for 35 members who appeared for the Union trial, apologized for their actions, and pledged loyalty to the Union. Eighteen of these reduced fines have been paid in full.

Section 8 (b)(1)(A) of the Act provides, in pertinent part, that it shall be an unfair labor practice for a labor organization "to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 of this title." [5] Among the § 7 rights guaranteed to employees is the right to refrain from any of the concerted activities described in that section.[6] We have previously held that § 8 (b)(1)(A) was not intended to give the Board power to regulate internal union affairs, including the imposition of disciplinary fines, with their consequent court enforcement, against members who violate the unions' constitutions and bylaws. *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 (1967); *Scofield* v. *NLRB*, 394

[5] The proviso to this section states: "That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." It has been the Board's position that this proviso authorizes the unions to impose disciplinary fines on union members. *Minneapolis Star & Tribune Co.*, 109 N. L. R. B. 727, 34 L. R. R. M. 1431 (1954); *Wisconsin Motor Corp.*, 145 N. L. R. B. 1097, 55 L. R. R. M. 1085 (1964); *Allis-Chalmers Mfg. Co.*, 149 N. L. R. B. 67, 57 L. R. R. M. 1242 (1964). This Court, however, in holding that court enforcement of union fines was not an unfair labor practice in *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 (1967), relied on congressional intent only with respect to the first part of this section. The parties' principal contentions in this case do not depend on the scope of the proviso and we do not consider its interpretation necessary to our conclusion.

[6] In its entirety § 7 provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)." 61 Stat. 140, 29 U. S. C. § 157.

U. S. 423 (1969). In *Allis-Chalmers* we held that court enforcement of fines ranging from $20 to $100 for crossing picket lines did not "restrain or coerce" employees within the meaning of the Act. And in *Scofield* we held that the union did not violate the Act in imposing fines of $50 and $100 on members for violating a union rule relating to production ceilings.

In deciding these cases, the Court several times referred to the unions' imposition of "reasonable" fines. In particular, the *Scofield* Court concluded "that the union rule is valid and that its enforcement by *reasonable* fines does not constitute the restraint or coercion proscribed by § 8 (b)(1)(A)." 394 U. S., at 436 (emphasis added). The Company contends, not illogically, that the Court's use of the adjective "reasonable" was intended to suggest to the Board that an unreasonable fine would amount to an unfair labor practice.

This interpretation, however, permissible as it may be, is only dicta, since in both *Allis-Chalmers* and in *Scofield* the reasonableness of the fines was assumed. 388 U. S., at 192–193, n. 30; 394 U. S., at 430.[7] Being squarely presented with the issue in this case, we recede from the implications of the dicta in these earlier cases. While

[7] Moreover, since the Board has consistently over a long period of time interpreted the Act as not giving it authority to examine the reasonableness of disciplinary fines, *infra*, at 74–75, it is not likely that the Court specificially intended, by the use of a single adjective, and without mentioning the Labor Board cases to the contrary, to overturn the Board's interpretation of the Act. Nor can it be argued that the Court was unaware of the Board's interpretation, for the *Scofield* Court stated that in *Allis-Chalmers* it

"essentially accepted the position of the National Labor Relations Board dating from *Minneapolis Star & Tribune Co.*, 109 N. L. R. B. 727 (1954) where the Board also distinguished internal from external enforcement in holding that a union could fine a member for his failure to take part in picketing during a strike . . . ." *Scofield* v. *NLRB*, 394 U. S. 423, 428 (1969).

"unreasonable" fines may be more coercive than "reasonable" fines, all fines are coercive to a greater or lesser degree. The underlying basis for the holdings of *Allis-Chalmers* and *Scofield* was not that reasonable fines were noncoercive under the language of § 8 (b)(1)(A) of the Act, but was instead that those provisions were not intended by Congress to apply to the imposition by the union of fines not affecting the employer-employee relationship and not otherwise prohibited by the Act. The reason for this determination, in turn, was that Congress had not intended by enacting this section to regulate the internal affairs of unions to the extent that would be required in order to base unfair labor practice charges on the levying of such fines.

The Court's examination of the legislative history of this provision in *Allis-Chalmers* led to the conclusion that:

> "What legislative materials there are dealing with § 8 (b)(1)(A) contain not a single word referring to the application of its prohibitions to traditional internal union discipline in general, or disciplinary fines in particular. On the contrary there are a number of assurances by its sponsors that *the section was not meant to regulate the internal affairs of unions.*" 388 U. S., at 185–186 (emphasis added).[8]

In *Scofield* we decided that Congress intended to distinguish between the external and the internal enforcement of union rules, and that therefore the Board would

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[8] As we also noted in *Allis-Chalmers*, this interpretation is supported by the Landrum-Griffin Act, where "Congress expressly recognized that a union member may be 'fined, suspended, expelled, or otherwise disciplined,' and enacted only procedural requirements to be observed. 73 Stat. 523, 29 U. S. C. § 411 (a)(5)." *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S., at 194.

have authority to pass on those rules affecting an individual's employment status but not on his union membership status. 394 U. S., at 428–430.

Inquiry by the Board into the multiplicity of factors that the parties and the Court of Appeals correctly thought to have a bearing on the issue of reasonableness would necessarily lead the Board to a substantial involvement in strictly internal union affairs. While the line may not always be clear between those matters that are internal and those that are external, to the extent that the Board was required to examine into such questions as a union's motivation for imposing a fine it would be delving into internal union affairs in a manner which we have previously held Congress did not intend.[9] Given the rationale of *Allis-Chalmers* and *Scofield*, the Board's conclusion that § 8 (b)(1)(A) of the Act has nothing to say about union fines of this nature, whatever their size, is correct. Issues as to the reasonableness or unreasonableness of such fines must be decided upon the basis of the law of contracts, voluntary associations, or such other principles of law as may be applied in a forum competent to adjudicate the issue. Under our holding, state courts will be wholly free to apply state law to such issues at the suit of either the union or the member fined.

Our conclusion is also supported by the Board's long-standing administrative construction to the same effect. At least since 1954, it has been the Board's consistent position that it has "not been empowered by Congress . . . to pass judgment on the penalties a union may impose on a member so long as the penalty does not

[9] Cf. *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 296 (1971); *U. O. P. Norplex* v. *NLRB*, 445 F. 2d 155, 158 (CA7 1971) ("The reasonableness of the fines is a matter for the state court to determine should the Union seek judicial enforcement of the fines").

impair the member's status as an employee." *Local 283, UAW*, 145 N. L. R. B. 1097, 1104 (1964). See also *Minneapolis Star & Tribune Co.*, 109 N. L. R. B. 727, 34 L. R. R. M. 1431 (1954). We have held in analogous situations that such a consistent and contemporaneous construction of a statute by the agency charged with its enforcement is entitled to great deference by the courts. *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 433–434 (1971); *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965).[10]

The Court of Appeals and the Company have suggested several policy reasons why the Board should not leave the determinations of reasonableness entirely to the state courts. Their basic reasons are, first, that more uniformity in the determination of what is reasonable will result if the Board suggests standards and, second, that more expertise in labor matters will be brought to bear if the issue is decided by the Board rather than solely by the courts. Even if we were to concede the relevance of policy factors in determining congressional intent, we are not persuaded that the Board is necessarily the better forum for determining the reasonableness of a fine.

As we noted in *Allis-Chalmers*, court enforcement of union fines is not a recent innovation but has been known at least since 1867. 388 U. S., at 182 n. 9. See also Summers, The Law of Union Discipline: What the Courts Do in Fact, 70 Yale L. J. 175 (1960). The relationship between a member and his union is generally viewed as contractual in nature, *International Association of Machinists* v. *Gonzales*, 356 U. S. 617, 618 (1958); *Scofield* v. *NLRB*, 394 U. S., at 426 n. 3; *NLRB* v. *Textile Workers*, 409 U. S. 213, 217 (1972), and the

[10] It is also noteworthy that when Congress has intended the Board to examine a fee for being excessive or unreasonable, it has specifically so stated and has provided statutory standards for the Board to follow in making such a determination. See, *e. g.*, 29 U. S. C. § 158 (b)(5) (union initiation fees).

local law of contracts or voluntary associations usually governs the enforcement of this relationship. *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S., at 182 and 193 n. 32; *Scofield* v. *NLRB*, *supra*, at 426 n. 3.

We alluded to state court enforcement of unusually harsh union discipline in *Allis-Chalmers* when we stated that "state courts, in reviewing the imposition of union discipline, find ways to strike down 'discipline [which] involves a severe hardship.'" 388 U. S., at 193 n. 32, quoting Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1078 (1951). The Board assumed that in view of this statement, our reference to "reasonable" fines, when reasonableness was not in issue, in *Allis-Chalmers* and in *Scofield*, was merely adverting to the usual standard applied by state courts in deciding whether to enforce union-imposed fines. The Board reads these cases, therefore, as encouraging state courts to use a reasonableness standard, not as a directive to the Board.[11]

Our review of state court cases decided both before and after our decisions in *Allis-Chalmers* and *Scofield* reveals that state courts applying state law are quite willing to determine whether disciplinary fines are reasonable in amount.[12] Indeed, the expertise required for a deter-

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[11] The Board's interpretation of our decisions is basically the following:

"Thus, the Court's findings that the fines in those cases were reasonable seems directed to enforcing courts, encouraging those courts to make an independent determination of the reasonableness of the fine in each case presented, in the same fashion as courts limit other union discipline which imposes a severe hardship. Such considerations are of an equitable nature rather than of the character of restraint and coercion with which the National Labor Relations Act treats." *Machinists, Local Lodge 504 (Arrow Development Co.)*, 185 N. L. R. B. 365, 368, 75 L. R. R. M. 1008, 1010 (1970).

[12] *Auto Workers Local 283* v. *Scofield*, 76 L. R. R. M. 2433 (Wis. Sup. Ct. 1971) ($100 fine deemed reasonable); *Farnum* v.

mination of reasonableness may well be more evident in a judicial forum that is called upon to assess reasonableness in varying factual contexts than it is in a specialized agency. In assessing the reasonableness of disciplinary fines, for example, state courts are often able to draw on their experience in areas of the law apart from labor relations.[13]

Nor is it clear, as contended by the Court of Appeals, that the Board's setting of standards of reasonableness will necessarily result in greater uniformity in this area even if uniformity is thought to be a desirable goal. Since state courts will have jurisdiction to determine reasonableness in the enforcement context in any event, the Board's independent determination of reasonableness in an unfair labor practice context might well yield a

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Kurtz, 70 L. R. R. M. 2035 (Los Angeles Mun. Ct. 1968) ($592 fine deemed unreasonable and reduced to $100); *McCauley* v. *Federation of Musicians*, 26 L. R. R. M. 2304 (Pa. Ct. of Common Pleas 1950) ($300 fine deemed excessive and reduced to $100); *North Jersey Newspaper Guild Local No. 173* v. *Rakos*, 110 N. J. Super. 77, 264 A. 2d 453 (1970) ($750 fine reduced to $500, which was deemed reasonable); *Walsh* v. *Communications Workers of America, Local 2336*, 259 Md. 608, 271 A. 2d 148 (1970) ($500 fine deemed reasonable); *Local 248, United Auto Workers* v. *Natzke*, 36 Wis. 2d 237, 153 N. W. 2d 602 (1967) ($100 fine upheld); *Jost* v. *Communications Workers of America, Local 9408*, 13 Cal. App. 3d Supp. 7, 91 Cal. Rptr. 722 (1970) ($299 fine upheld, the court stating that "it is the settled law in this country that such a fine becomes a debt enforceable by the courts in an amount that is not unreasonably large." *Id.*, at 12, 91 Cal. Rptr., at 725).

[13] See, *e. g.*, *Farnum* v. *Kurtz*, *supra*, at 2041, where a municipal court judge, in reducing a union-imposed fine of $592 to $100, revealed that the kind of expertise required by this type of case is not that of a technical knowledge of labor law:

"Based upon the facts herein and the Court's experiences [in passing judgment in thousands of misdemeanor cases], the fine assessed is much too large and unreasonable. The Court finds that a fine of $100.00 serves the ends of justice and is more in keeping with the circumstances herein and reasonable."

conflict when the two forums are called upon to review the same fine.

For all of the foregoing reasons, we conclude that the Board was warranted in determining that when the union discipline does not interfere with the employee-employer relationship or otherwise violate a policy of the National Labor Relations Act,[14] the Congress did not authorize it "to evaluate the fairness of union discipline meted out to protect a legitimate union interest." [15] The judgment of the Court of Appeals is, therefore,

Reversed.

MR. CHIEF JUSTICE BURGER, dissenting.

It is odd, to say the least, to find a union urging on us severe limitations on NLRB authority, and telling us that state courts are the proper forum to resolve questions regarding the reasonableness of fines imposed on workers for violation of union rules. For years, there has been unrelenting union opposition to state court "intervention" into industrial disputes and union activities. We have been told countless times that the "expertise" of the Labor Board, based on its overview and intimate familiarity with labor problems, is essential in this area.

A union must, of course, have some disciplinary powers or it would disintegrate. However, the power to discipline can easily turn from a means of enforcing valid

[14] *Scofield* v. *NLRB*, 394 U. S., at 429; *NLRB* v. *Marine Workers*, 391 U. S. 418 (1968).

[15] *Machinists, Local Lodge 504 (Arrow Development Co.)*, 185 N. L. R. B. 365, 638, 75 L. R. R. M. 1008, 1011 (1970). The Board has long held that the Act proscribes certain unacceptable methods of union coercion, such as physical violence to force an employee to join a union or to participate in a strike. *In re Maritime Union*, 78 N. L. R. B. 971, enforced, 175 F. 2d 686 (CA2 1949), cited in *Scofield* v. *NLRB*, *supra*, at 428 n. 4.

rules to an oppressive and coercive device of retribution, a weapon which, when used to extremes, may deprive a working man of his very means of sustenance. Whether a particular fine is required in a particular situation involves a weighing of the delicate balance of relations between the employers, employees, and the union involved. Such an intimate knowledge of labor relations has consistently been ascribed to the Board, often by the unions. It is the Board that deals with such matters on a daily basis. It is the Board that has the jurisdiction and experience to devise and employ national standards to govern union conduct; there are valid reasons for essential uniformity and consistency in the matters of fines. To isolate this sensitive subject and thrust it on the state courts is contrary to the entire history of the federal labor statutes and opens the door to a wide disparity of fines for the same conduct in different States.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN concur, dissenting.

I dissent from the holding of the Court that the Board has no jurisdiction to determine the "reasonableness" of the fines placed by the Union on its dissident members.

The Union and Boeing had an effective collective-bargaining agreement from May 16, 1963 through September 15, 1965. On the expiration of that contract the Union struck against Boeing, causing a work stoppage that lasted 18 days. On October 2, 1965, a new collective agreement was reached and work was resumed.

During the strike, about 143 employees at the Michoud plant crossed the picket line and reported for work. All of these had been Union members during the 1963–1965 contract period. Some of the 143 who worked during the strike did not resign from the Union; 119 did resign—61 before they crossed the picket line and re-

turned to work; 58 resigned during the course of the strike, but after they had crossed the picket line. All of these resignations were submitted after the expiration of the 1963–1965 collective agreement. The Union never warned members on this or on earlier occasions, that disciplinary measures could or would be taken against members who crossed the picket line.

After the new collective agreement was reached, the Union notified all members who had crossed the picket line to work during the strike that charges had been laid against them and that they would be tried by the Union for "improper" conduct, the Union's constitution permitting disciplinary measures, including "reprimand, fine, suspension and/or expulsion from membership, or any lesser penalty or any combination."

Those who appeared for trial and those who did not appear were found guilty and fined $450 each and barred from holding a Union office for five years. The fines of some 35 who appeared and apologized and took a loyalty oath were reduced to 50% of their earnings during the strike; and the prohibition against holding Union office was reduced in those cases.

The Union sent out a written notice saying that the unpaid fines had been referred to an attorney for collection and that the reduced fines would be restored to $450 if not paid. Suits against nine employees were filed in a state court to collect the fines plus attorneys' fees and interest; and they are unresolved.

Boeing filed a charge of an unfair labor practice against the Union under § 8 (b)(1)(A) of the Act.* The Gen-

*That section provides:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules

eral Counsel issued a complaint and the Board decided that the Union had violated § 8 (b)(1)(A) except for the fines on members for crossing the picket line to work and for the fines on those who resigned after returning to work during the strike, for work performed during the strike prior to their resignations. But the Board, one member dissenting, refused to pass on the reasonableness of the fines, holding it lacked the power to do so.

The unfair labor practice under § 8 (b)(1)(A) is the action of a union "to restrain or coerce" an employee from the "right to refrain from" assisting a union as that right is defined in § 7. In *Scofield* v. *NLRB*, 394 U. S. 423, we upheld a union rule and concluded "that its enforcement by *reasonable* fines does not constitute the restraint or coercion proscribed by § 8 (b)(1)(A)." *Id.*, at 436 (emphasis added). See also *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175. The imposition of a nominal fine of $1 might suit the circumstances of a case, where a $1,000 fine would be monstrous. A nominal fine might be justified where, as here, the employees had no warning that they would or could be fined for working behind a picket line. A fine where the only sanction would be temporary suspension from the union might be "reasonable," yet unreasonable if it was court enforceable, meaning, as it does here, that attorneys' fees, costs,

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with respect to the acquisition or retention of membership therein." 61 Stat. 141, 29 U. S. C. § 158 (b)(1)(A).

Section 7 provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3)." 29 U. S. C. § 157.

and interest may be added. A member who must pay the union's attorney as well as his own if he challenges the reasonableness of a fine in a state court and loses, may well be suffering an unconscionable penalty. Moreover, the fine may be imposed by a union which believed as did the present Union that the member had no "right" to resign, though *NLRB* v. *Textile Workers*, 409 U. S. 213, held to the contrary. The present fines seem to be swollen by that predilection of the Union. The present fines also exceed the earnings of the workers during the strike period. By what standard can that possibly be justified? As member McCulloch of the Board, dissenting, said, the excess of the fines over the wages collected during this period is in actual effect an assessment after the strike is over. If after the strike the Union caused Boeing to suspend a member without pay after the strike because he had worked during the strike, there could be no question but that the Union violated § 8 (b)(1)(A). Yet, the assessment of fines greater than the wages earned during the strike has precisely that effect. Thus, in assessing an unreasonable fine the Union, in my view, goes beyond the permissible bounds of regulating its internal affairs.

It is no answer to say that the reasonableness of a fine may be tested in a state-court suit. That envisages a rich and powerful union suing a rich and powerful employee. Employees, however, are often at the bottom of the totem pole, without financial resources, and unworldly when it comes to litigation. Such a suit is likely to be no contest. The Board procedures, on the other hand, may be readily available. If an employee files a charge with any merit, the Regional Director will issue a complaint. Thereafter, the General Counsel represents the employee, and the agency bears any cost of prosecuting the claim.

But my difficulty with the Court's decision is even greater. State judges, though honest and competent, have no expertise in labor-management relations. The Board does have that expertise and can evolve guidelines based on its broad experience. It is said that Congress has provided the Board with no guidelines for passing on the "reasonableness" of union-imposed fines. But the Board through case-by-case treatment has been developing an administrative common law concerning "unfair" practices of employers and unions alike. We have said on other occasions that the "experience and commonsense" which are facets of the expertise of the Board, *NLRB* v. *Radio & Television Broadcast Engineers,* 364 U. S. 573, 582–583, are adequate for the difficult and delicate responsibilities which Congress has entrusted to it, subject of course to judicial review. A fine discretely related to a legitimate union need and reflecting principled motivations under the law is one thing. A fine that reflects the raw power exercised by a union in its hunger for all-pervasive authority over members is quite another problem. The Labor Board, which knows the nuances of this problem better than any other tribunal, is the keeper of the conscience under the Act. It and it alone has primary responsibility to police unions, as well as employers, in protection of the rights of workers. In my view it cannot properly perform its duties under § 8(b)(1)(A) unless it determines whether the nature and amount of the fine levied by a union constitute an unfair labor practice.

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71–1417. Argued March 26, 1973—Decided May 21, 1973

Where the Union's constitution and bylaws are silent on the subject of voluntary resignation from the Union, the Union committed an unfair labor practice when it sought court enforcement of fines imposed for strikebreaking activities by employees who had resigned from the Union, even though the Union constitution expressly prohibited members from strikebreaking. *NLRB* v. *Textile Workers*, 409 U. S. 213.

148 U. S. App. D. C. 119, 459 F. 2d 1143, affirmed.

Bernard Dunau argued the cause for petitioner. With him on the briefs were *Plato E. Papps, Louis P. Poulton,* and *C. Paul Barker.*

Norton J. Come argued the cause for respondent National Labor Relations Board. With him on the brief were *Solicitor General Griswold, Harriet S. Shapiro, Peter G. Nash, John S. Irving,* and *Patrick Hardin. Samuel Lang* argued the cause for respondent Boeing Co. With him on the brief were *C. Dale Stout* and *Frederick A. Kullman.**

**J. Albert Woll, Laurence Gold,* and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal.

Milton Smith, Gerard C. Smetana, and *Jerry Kronenberg* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging affirmance.

PER CURIAM.

In this companion case to *NLRB* v. *Boeing Co., ante,* p. 67, we must decide whether our decision in *NLRB* v. *Textile Workers,* 409 U. S. 213, authorizes the Board to find that a union commits an unfair labor practice in seeking court enforcement of fines imposed for strikebreaking activities by employees who have resigned from the union, even though the union constitution expressly prohibits members from strikebreaking. We hold that it does.

On September 16, 1965, the day after the expiration of the collective-bargaining agreement between Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union), and the Boeing Co. (the Company), the Union called a lawful strike and picketed the Company's Michoud, Louisiana, plant to further its demands for a new contract. The strike continued for 18 days, during which time 143 of the 1,900 production and maintenance employees represented by the Union crossed the picket line to work. All of these employees had been members of the Union before the strike,[1] but 61 resigned their membership prior to returning to work and another 58 resigned after they returned to work.[2] These resignations were tendered in registered or certified letters to the Union. Neither its constitution nor its bylaws con-

[1] The expired collective agreement contained a maintenance-of-membership provision that required new employees, as a condition of continued employment, to become members of the Union unless they notified both the Union and the Company within 40 days of accepting employment that they did not wish to join. Further, Union members were required to maintain their membership during the life of the contract.

[2] The remaining employees who returned to work during the strike did not resign from the Union.

tained any provision expressly permitting or forbidding such resignations.

The strike ended on October 4, 1965, after ratification of a new collective-bargaining agreement by the Union membership. During late October and early November, the Union notified all employees who had crossed the picket line to work during the strike that charges had been preferred against them under the Union constitution for "Improper Conduct of a Member" because of their having "accept[ed] employment . . . in an establishment where a strike or lockout exist[ed]." They were advised of the dates of their Union trials, which were to be held even in their absence, and of their right to be represented by any counsel who was a member of the International Union. Fines were imposed on all employees who had worked during the strike without regard to whether or not such employees had resigned or had remained members.[3] None of the disciplined employees processed intra-union appeals. To the extent that fines were not paid,[4] the Union sent written notices to the offending employees stating that the matter had been referred to an attorney for collection. Suits were initiated in state court against nine employees for the purpose of collecting the fines plus attorneys' fees and interest. None of these suits has been resolved.

The Company filed an unfair labor practice charge with the National Labor Relations Board alleging that the Union had violated § 8 (b)(1)(A) of the National Labor Relations Act, 61 Stat. 141, 29 U. S. C. § 158 (b)

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[3] A standard fine of $450 was imposed on each of the disciplined employees. The amount was reduced, however, for those few members who appeared at their hearings, apologized for their actions, and pledged loyalty to the Union.

[4] None of the $450 fines has been paid, but reduced fines have been paid in a few instances.

(1)(A).[5] The General Counsel issued a complaint, and the Board held that the Union violated § 8(b)(1)(A), by fining those employees who had resigned from the Union before returning to work during the strike, and by fining those who had resigned after returning to work to the extent that such fines were based on post-resignation work. No violation was found in the Union's fining members for crossing the picket line to work during the strike or in its fining those employees who resigned after they returned to work for work performed prior to resignation. The Board ordered the Union to cease and desist from fining employees who had resigned from the Union for their post-resignation work during the strike and from seeking court enforcement of such fines. It further ordered reimbursement to employees who had already paid fines for any amount imposed because of post-resignation work. The Court of Appeals sustained these holdings, 148 U. S. App. D. C. 119, 459 F. 2d 1143 (1972), and, on the Union's petition for review, we granted certiorari. 409 U. S. 1074.

In *NLRB* v. *Textile Workers*, 409 U. S., at 217, we held that "[w]here a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct." Since in that case there was no provision in the Union's constitution or bylaws limiting the circumstances in which a member could resign, we concluded that the members

[5] Section 8 (b)(1)(A) of the Act provides, in relevant part:

"It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . ."

were free to resign at will and that § 7 of the Act, 29 U. S. C. § 157,[6] protected that right to return to work during a strike which had been commenced while they were union members.[7] The Union's imposition of court-collectible fines against the former members for such work was, therefore, held to violate § 8 (b)(1)(A).

Here, as in *Textile Workers*, the Union's constitution and bylaws are silent on the subject of voluntary resignation from the Union.[8] And here, as there, we leave open the question of the extent to which contractual restriction on a member's right to resign may be limited by the Act. Since there is no evidence that the employees here either knew of or had consented to any limitation on their right to resign, we need "only to apply the law which normally is reflected in our free institutions—the right of the individual to join or to resign from associations, as he sees fit 'subject of course to any financial obligations due and owing' the group with which he was associated." *Textile Workers, supra,* at 216.

The Union contends, however, that a result different from *Textile Workers* is warranted in this case because,

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[6] Section 7 of the Act provides, in relevant part:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . ."

[7] It was stipulated in that case that all 31 of the employees who resigned from the Union during the strike and returned to work participated in the strike vote, and voted in favor of the strike. *NLRB* v. *Textile Workers*, 409 U. S. 213, 219 n. 2 (BLACKMUN, J., dissenting).

[8] Since the collective-bargaining agreement expired prior to the times of the resignations, the maintenance-of-membership clause therein was no impediment to resigning.

even though its constitution does not expressly restrict the right to resign during a strike, it does impose on members an obligation to refrain from strikebreaking. The Union asserts that this provision has been consistently interpreted to bind a member, notwithstanding his resignation, to abstain from strikebreaking for the duration of an existing strike. It urges that this provision may be enforced as a matter of contract law against one whose membership has ceased, because it was an obligation he undertook while a member.

The provision in the Union's constitution which proscribes strikebreaking by its terms purports only to define "misconduct of a member." Nothing in the record indicates that Union members were informed, prior to the bringing of the charges that were the basis of this action, that the provision was interpreted as imposing any obligation on a resignee.[9] Thus, in order to sustain the Union's position, we would first have to find, contrary to the determination of the Board and of the Court of Appeals, that the Union constitution by implication extended its sanctions to nonmembers, and then further conclude that such sanctions were consistent with the Act. But we are no more disposed to find an implied post-resignation commitment from the strikebreaking proscription in the Union's constitution here than we were to find it from the employees' participation in the strike vote and ratification of penalties in *Textile*

[9] The Union points out in its brief that at the 1972 International Union convention its interpretation of the strikebreaking proscription was made explicit. This constitutional amendment, made seven years after the strike here, is persuasive evidence that it was not there before, or at a minimum, that the proscription then existing did not apprise the employees of their asserted obligations to the Union.

Workers.[10] Accordingly, the judgment of the Court of Appeals sustaining the Board's finding of an unfair labor practice on the part of petitioner Union is

Affirmed.

MR. JUSTICE BLACKMUN, concurring in the judgment.

In *NLRB* v. *Textile Workers*, 409 U. S. 213 (1972), the strikebreaking employees, while they were members of the union, had all voted to strike. On the day following the inception of the strike, these employees also voted in favor of a union resolution that anyone aiding or abetting the company during the strike would be subject to a fine.* And all had participated in the strike prior to resigning from the union.

I was in solitary dissent in *Textile Workers*, *id.*, at 218. I emphasized there that "it seems likely that the three factors of a member's strike vote, his ratification of strikebreaking penalties, and his actual participation in the strike, would be far more reliable indicia of his obligation to the union and its members than the presence of boilerplate provisions in a union's constitution," *id.*, at 220; that the Court's opinion seemed to me "to exalt the formality of resignation over the substance of the various interests and national labor policies that [were] at stake," *id.*, at 221; that § 7 of the National Labor Relations Act "does not necessarily give him [the employee] the right to abandon these [union] activities

[10] In its reply brief, the Union argues that in *Textile Workers* there was no limiting rule on post-resignation return to work during the course of the strike, but that in this case, the Union constitution proscribed such conduct. In *Textile Workers*, however, there was a duly enacted rule prohibiting any member from aiding and abetting the employer during the strike and subjecting violators to a $2,000 fine. On its face, the constitutional proscription here advanced is no broader than that rule.

*See 409 U. S., at 218–219, nn. 1 and 2.

in midcourse once he has undertaken them voluntarily," *id.*, at 222, quoting from 446 F. 2d 369, 373; and that the policy of § 7 would not be frustrated by a holding that an employee, in the circumstances of that case, could "knowingly waive his § 7 right to resign from the union and to return to work without sanction." 409 U. S., at 222–223.

The present case, however, is a very different situation. None of the Boeing employees who resigned from the Union had been given notice of a strikebreaking penalty before the strike vote or before their participation in the strike. The imposition of a penalty was never ratified formally by the union membership. The members were not notified that post-resignation strikebreaking was proscribed and would subject them to union discipline. And the provision in the Union's constitution, referred to by the Court, *ante*, at 89, as to a member's general obligation to refrain from strikebreaking, surely does not make up for this lack of notice, and it would not do so even if it were clearly applicable, which it is not, to strikebreaking after resignation from the Union.

Without effective notice of obligations that are supposed to be assumed, there can be no waiver of a member's § 7 right to refrain from participation in a legal strike. In the absence of such notice, § 8 (b)(1)(A) bars the union from subjecting a member to a choice between the substantial obligation of weathering the strike and that of being subjected to court-collectible fines for failure to do so.

I, therefore, join in the Court's judgment.

SCHOOL BOARD OF CITY OF RICHMOND, VIRGINIA, ET AL. *v.* STATE BOARD OF EDUCATION OF VIRGINIA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 72–549. Argued April 23, 1973—Decided May 21, 1973*

462 F. 2d 1058, affirmed by an equally divided Court.

George B. Little argued the cause for petitioners in No. 72–549. With him on the briefs was *Conrad B. Mattox, Jr. William T. Coleman, Jr.*, argued the cause for petitioners in No. 72–550. With him on the briefs were *Jack Greenberg, James M. Nabrit III, Norman J. Chachkin, Louis R. Lucas, William L. Taylor,* and *Anthony G. Amsterdam.*

Philip B. Kurland argued the cause for respondents in both cases. With him on the brief were *Edward I. Rothschild, Andrew P. Miller,* Attorney General of Virginia, *William G. Broaddus* and *D. Patrick Lacy, Jr.*, Assistant Attorneys General, *Frederick T. Gray, Walter E. Rogers, J. Segar Gravatt, R. D. McIlwaine III, L. Paul Byrne,* and *J. Mercer White, Jr.*

Solicitor General Griswold argued the cause for the United States as *amicus curiae* urging affirmance in both cases. With him on the brief were *Assistant Attorney General Pottinger, A. Raymond Randolph, Jr., Brian K. Landsberg,* and *John C. Hoyle.*†

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*Together with No. 72–550, *Bradley et al.* v. *State Board of Education of Virginia et al.*, also on certiorari to the same court.

†Briefs of *amici curiae* urging reversal in both cases were filed by *Stephen J. Pollak, Richard M. Sharp,* and *David Rubin* for the National Education Association, and by *Melvin L. Wulf, Sanford Jay Rosen,* and *Philip Hirschkop* for the American Civil Liberties Union

PER CURIAM.

The judgment is affirmed by an equally divided Court.

MR. JUSTICE POWELL took no part in the consideration or decision of these cases.

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et al. *Margie Pitts Hames* filed a brief for the Black Parents of Atlanta, Georgia, as *amicus curiae* urging reversal in No. 72–550.

Briefs of *amici curiae* urging affirmance in both cases were filed by *David I. Caplan* for the Jewish Rights Council, and by *Harold H. Fuhrman* for the National Suburban League, Ltd. *Charles S. Conley* and *Floyd B. McKissick* filed a brief for the Congress of Racial Equality as *amicus curiae* urging affirmance in No. 72–549.

COLUMBIA BROADCASTING SYSTEM, INC. *v.* DEMOCRATIC NATIONAL COMMITTEE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71–863. Argued October 16, 1972—Decided May 29, 1973*

The Democratic National Committee requested a declaratory ruling from the Federal Communications Commission (FCC) that the Communications Act or the First Amendment precluded a licensee from having a general policy of refusing to sell time to "responsible entities" to present their views on public issues. The Business Executives' Move for Vietnam Peace filed a complaint with the FCC, alleging that a broadcaster had violated the First Amendment by refusing to sell it time to broadcast spot announcements expressing the group's views on the Vietnam conflict and that the station's coverage of antiwar views did not meet the requirements of the Fairness Doctrine. The FCC rejected the Fairness Doctrine challenge and ruled that a broadcaster was not prohibited from having a policy of refusing to accept paid editorial advertisements by individuals and organizations like respondents. The Court of Appeals reversed, holding that "a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted," and remanded the causes to the FCC to develop regulations governing which, and how many, editorial announcements would be aired. *Held:* Neither the Communications Act nor the First Amendment requires broadcasters to accept paid editorial advertisements. Pp. 101–114; 121–170.

146 U. S. App. D. C. 181, 450 F. 2d 642, reversed.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court with respect to Parts I, II, and IV, finding that:

1. The basic criterion governing use of broadcast frequencies is the right of the public to be informed; the manner by which this

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*Together with Nos. 71–864, *Federal Communications Commission et al.* v. *Business Executives' Move for Vietnam Peace et al.*; 71–865, *Post-Newsweek Stations, Capital Area, Inc.* v. *Business Executives' Move for Vietnam Peace*; and 71–866, *American Broadcasting Cos., Inc.* v. *Democratic National Committee*, also on certiorari to the same court.

interest is best served is dispositive of the respondents' statutory and First Amendment contentions. Pp. 101–114.

(a) In evaluating respondents' claims, great weight must be afforded the decisions of Congress and the experience of the FCC. Pp. 101–103.

(b) Congress has consistently rejected efforts to impose on broadcasters a "common carrier" right of access for all persons wishing to speak out on public issues. Instead, it reposed in the FCC regulatory authority by which the Fairness Doctrine was evolved to require that the broadcaster's coverage of important public issues must be adequate and must fairly reflect differing viewpoints; thus, no private individual or group has a right to command the use of broadcast facilities. Pp. 103–114.

2. The "public interest" standard of the Communications Act, which incorporates First Amendment principles, does not require broadcasters to accept editorial advertisements. Pp. 121–131.

(a) The FCC was justified in concluding that the public interest in having access to the marketplace of "ideas and experiences" would not be served by ordering a right of access to advertising time. There is substantial risk that such a system would be monopolized by those who could and would pay the costs, that the effective operation of the Fairness Doctrine itself would be undermined, and that the public accountability which now rests with the broadcaster would be diluted. Pp. 121–125.

(b) The difficult problems involved in implementing an absolute right of access would inevitably implicate the FCC in a case-by-case determination of who should be heard and when, thus enlarging the involvement of the Government in broadcasting operations. The FCC could properly take into account the fact that listeners and viewers constitute a kind of "captive audience" and that the public interest requires that a substantial degree of journalistic discretion must remain with broadcasters. Pp. 126–130.

THE CHIEF JUSTICE, joined by MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST, concluded, in Part III, that a broadcast licensee's refusal to accept a paid editorial advertisement does not constitute "governmental action" for First Amendment purposes. The Government is neither a "partner" to the action complained of nor engaged in a "symbiotic relationship" with the licensee. Pp. 114–121.

(a) Under the Communications Act a broadcast licensee is vested with substantial journalistic discretion in deciding how to meet its statutory obligations as a "public trustee." Pp. 114–117.

(b) The licensee's policy against accepting editorial advertising is compatible with the Communications Act and with the broadcaster's obligation to provide a balanced treatment of controversial questions. Pp. 118–121.

(c) The FCC has not fostered the licensee policy against accepting editorial advertisements; it has merely declined to command acceptance because the subject was a matter within the area of journalistic discretion. P. 118.

BURGER, C. J., announced the Court's judgment and delivered an opinion of the Court with respect to Parts I, II, and IV, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined, and in which as to Parts I, II, and III STEWART and REHNQUIST, JJ., joined. STEWART, J., filed an opinion concurring in Parts I, II, and III, *post*, p. 132. WHITE, J., filed an opinion concurring in Parts I, II, and IV, *post*, p. 146. BLACKMUN, J., filed an opinion concurring in Parts I, II, and IV, in which POWELL, J., joined, *post*, p. 147. DOUGLAS, J., filed an opinion concurring in the judgment, *post*, p. 148. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 170.

J. Roger Wollenberg argued the cause for petitioner in No. 71–863. With him on the briefs were *Lloyd N. Cutler, Timothy B. Dyk, Daniel Marcus, Robert V. Evans, John D. Appel,* and *Joseph DeFranco. Solicitor General Griswold* argued the cause for petitioners in No. 71–864. With him on the brief were *Acting Assistant Attorney General Comegys, Howard E. Shapiro,* and *John W. Pettit. Ernest W. Jennes* argued the cause for petitioner in No. 71–865. With him on the briefs were *Charles A. Miller* and *Michael Boudin. Vernon L. Wilkinson* argued the cause for petitioner in No. 71–866. With him on the brief were *James A. McKenna, Jr.,* and *Carl R. Ramey.*

Joseph A. Califano, Jr., argued the cause for respondent Democratic National Committee in Nos. 71–863, 71–864, and 71–866. With him on the brief was *John G. Kester. Thomas R. Asher* argued the cause for respondent Busi-

ness Executives' Move for Vietnam Peace in Nos. 71–864 and 71–865. With him on the brief was *Albert H. Kramer.*†

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court (Parts I, II, and IV) together with an opinion (Part III), in which MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST joined.

We granted the writs of certiorari in these cases to consider whether a broadcast licensee's general policy of not selling advertising time to individuals or groups wishing to speak out on issues they consider important violates the Federal Communications Act of 1934, 48 Stat. 1064, as amended, 47 U. S. C. § 151 *et seq.*, or the First Amendment.

In two orders announced the same day, the Federal Communications Commission ruled that a broadcaster who meets his public obligation to provide full and fair coverage of public issues is not required to accept editorial advertisements. *Democratic National Committee,* 25 F. C. C. 2d 216; *Business Executives' Move for Vietnam Peace,* 25 F. C. C. 2d 242. A divided Court of Appeals reversed the Commission, holding that a broadcaster's fixed policy of refusing editorial advertisements violates the First Amendment; the court remanded the cases to the Commission to develop procedures and guidelines for administering a First Amendment right of access. *Business Executives' Move For Vietnam Peace* v. *FCC,* 146 U. S. App. D. C. 181, 450 F. 2d 642 (1971).

The complainants in these actions are the Democratic

†*Floyd Abrams* and *Corydon B. Dunham* filed a brief for National Broadcasting Co., Inc., as *amicus curiae* urging reversal.

J. Albert Woll, Laurence Gold, and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

National Committee (DNC) and the Business Executives' Move for Vietnam Peace (BEM), a national organization of businessmen opposed to United States involvement in the Vietnam conflict. In January 1970, BEM filed a complaint with the Commission charging that radio station WTOP in Washington, D. C., had refused to sell it time to broadcast a series of one-minute spot announcements expressing BEM views on Vietnam. WTOP, in common with many, but not all, broadcasters, followed a policy of refusing to sell time for spot announcements to individuals and groups who wished to expound their views on controversial issues. WTOP took the position that since it presented full and fair coverage of important public questions, including the Vietnam conflict, it was justified in refusing to accept editorial advertisements. WTOP also submitted evidence showing that the station had aired the views of critics of our Vietnam policy on numerous occasions. BEM challenged the fairness of WTOP's coverage of criticism of that policy, but it presented no evidence in support of that claim.

Four months later, in May 1970, DNC filed with the Commission a request for a declaratory ruling:

> "That under the First Amendment to the Constitution and the Communications Act, a broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as the DNC, for the solicitation of funds and for comment on public issues."

DNC claimed that it intended to purchase time from radio and television stations and from the national networks in order to present the views of the Democratic Party and to solicit funds. Unlike BEM, DNC did not object to the policies of any particular broadcaster but claimed that its prior "experiences in this area make it

clear that it will encounter considerable difficulty—if not total frustration of its efforts—in carrying out its plans in the event the Commission should decline to issue a ruling as requested." DNC cited *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969), as establishing a limited constitutional right of access to the airwaves.

In two separate opinions, the Commission rejected respondents' claims that "responsible" individuals and groups have a right to purchase advertising time to comment on public issues without regard to whether the broadcaster has complied with the Fairness Doctrine. The Commission viewed the issue as one of major significance in administering the regulatory scheme relating to the electronic media, one going "to the heart of the system of broadcasting which has developed in this country . . . ." 25 F. C. C. 2d, at 221. After reviewing the legislative history of the Communications Act, the provisions of the Act itself, the Commission's decisions under the Act, and the difficult problems inherent in administering a right of access, the Commission rejected the demands of BEM and DNC.

The Commission also rejected BEM's claim that WTOP had violated the Fairness Doctrine by failing to air views such as those held by members of BEM; the Commission pointed out that BEM had made only a "general allegation" of unfairness in WTOP's coverage of the Vietnam conflict and that the station had adequately rebutted the charge by affidavit. The Commission did, however, uphold DNC's position that the statute recognized a right of political parties to purchase broadcast time for the purpose of soliciting funds. The Commission noted that Congress has accorded special consideration for access by political parties, see 47 U. S. C. § 315 (a), and that solicitation of funds by political parties is both

feasible and appropriate in the short space of time generally allotted to spot advertisements.[1]

A majority of the Court of Appeals reversed the Commission, holding that "a flat ban on paid public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted." 146 U. S. App. D. C., at 185, 450 F. 2d, at 646. Recognizing that the broadcast frequencies are a scarce resource inherently unavailable to all, the court nevertheless concluded that the First Amendment mandated an "abridgeable" right to present editorial advertisements. The court reasoned that a broadcaster's policy of airing commercial advertisements but not editorial advertisements constitutes unconstitutional discrimination. The court did not, however, order that either BEM's or DNC's proposed announcements must be accepted by the broadcasters; rather, it remanded the cases to the Commission to develop "reasonable procedures and regulations determining which and how many 'editorial advertisements' will be put on the air." *Ibid.*

Judge McGowan dissented; in his view, the First Amendment did not compel the Commission to undertake the task assigned to it by the majority:

> "[I]t is presently the obligation of a licensee to advance the public's right to know by devoting a substantial amount of time to the presentation of controversial views on issues of public importance, striking a balance which is always subject to redress by reference to the fairness doctrine. Failure to do so puts continuation of the license at risk—a sanction of tremendous potency, and one which the Commission is under increasing pressure to employ.

[1] The Commission's rulings against BEM's Fairness Doctrine complaint and in favor of DNC's claim that political parties should be permitted to purchase air time for solicitation of funds were not appealed to the Court of Appeals and are not before us here.

> "This is the system which Congress has, wisely or not, provided as the alternative to public ownership and operation of radio and television communications facilities. This approach has never been thought to be other than within the permissible limits of constitutional choice." 146 U. S. App. D. C., at 205, 450 F. 2d, at 666.

Judge McGowan concluded that the court's decision to overrule the Commission and to remand for development and implementation of a constitutional right of access put the Commission in a "constitutional straitjacket" on a highly complex and far-reaching issue.

I

MR. JUSTICE WHITE'S opinion for the Court in *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367 (1969), makes clear that the broadcast media pose unique and special problems not present in the traditional free speech case. Unlike other media, broadcasting is subject to an inherent physical limitation. Broadcast frequencies are a scarce resource; they must be portioned out among applicants. All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated. The Court spoke to this reality when, in *Red Lion,* we said "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Id.,* at 388.

Because the broadcast media utilize a valuable and limited public resource, there is also present an unusual order of First Amendment values. *Red Lion* discussed at length the application of the First Amendment to the broadcast media. In analyzing the broadcasters' claim that the Fairness Doctrine and two of its component rules violated their freedom of expression, we

held that "[n]o one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech.'" *Id.*, at 389. Although the broadcaster is not without protection under the First Amendment, *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166 (1948), "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." *Red Lion, supra,* at 390.

Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of a great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half century. For, during that time, Congress and its chosen regulatory agency have established a delicately balanced system of regulation intended to serve the interests of all concerned. The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence.

Thus, in evaluating the First Amendment claims of respondents, we must afford great weight to the decisions of Congress and the experience of the Commission. Professor Chafee aptly observed:

> "Once we get away from the bare words of the [First] Amendment, we must construe it as part of a Constitution which creates a government for the purpose of performing several very important tasks.

> The [First] Amendment should be interpreted so as not to cripple the regular work of the government. A part of this work is the regulation of interstate and foreign commerce, and this has come in our modern age to include the job of parceling out the air among broadcasters, which Congress has entrusted to the FCC. Therefore, every free-speech problem in the radio has to be considered with reference to the satisfactory performance of this job as well as to the value of open discussion. Although free speech should weigh heavily in the scale in the event of conflict, still the Commission should be given ample scope to do its job." 2 Z. Chafee, Government and Mass Communications 640–641 (1947).

The judgment of the Legislative Branch cannot be ignored or undervalued simply because one segment of the broadcast constituency casts its claims under the umbrella of the First Amendment. That is not to say we "defer" to the judgment of the Congress and the Commission on a constitutional question, or that we would hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression. The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem. Thus, before confronting the specific legal issues in these cases, we turn to an examination of the legislative and administrative development of our broadcast system over the last half century.

II

This Court has on numerous occasions recounted the origins of our modern system of broadcast regulation. See, *e. g., Red Lion, supra,* at 375–386; *National Broad-*

casting Co. v. *United States,* 319 U. S. 190, 210–217 (1943); *FCC* v. *Sanders Brothers Radio Station,* 309 U. S. 470, 474 (1940); *FCC* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 137–138 (1940). We have noted that prior to the passage of the Radio Act of 1927, 44 Stat. 1162, broadcasting was marked by chaos. The unregulated and burgeoning private use of the new media in the 1920's had resulted in an intolerable situation demanding congressional action:

> "It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacaphony of competing voices, none of which could be clearly and predictably heard." *Red Lion, supra,* at 376.

But, once it was accepted that broadcasting was subject to regulation, Congress was confronted with a major dilemma: how to strike a proper balance between private and public control. Cf. *Farmers Union* v. *WDAY,* 360 U. S. 525, 528 (1959).

One of the earliest and most frequently quoted statements of this dilemma is that of Herbert Hoover, when he was Secretary of Commerce. While his Department was making exploratory attempts to deal with the infant broadcasting industry in the early 1920's, he testified before a House Committee:

> "We can not allow any single person or group to place themselves in [a] position where they can censor the material which shall be broadcasted to the public, nor do I believe that the Government should ever be placed in the position of censoring this material." Hearings on H. R. 7357 before the House Committee on the Merchant Marine and Fisheries, 68th Cong., 1st Sess., 8 (1924).

That statement foreshadowed the "tightrope" aspects of Government regulation of the broadcast media, a problem the Congress, the Commission, and the courts have struggled with ever since. Congress appears to have concluded, however, that of these two choices—private or official censorship—Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided.

The legislative history of the Radio Act of 1927, the model for our present statutory scheme, see *FCC* v. *Pottsville Broadcasting Co., supra,* at 137, reveals that in the area of discussion of public issues Congress chose to leave broad journalistic discretion with the licensee. Congress specifically dealt with—and firmly rejected—the argument that the broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues. Some members of Congress—those whose views were ultimately rejected—strenuously objected to the unregulated power of broadcasters to reject applications for service. See, *e. g.,* H. R. Rep. No. 404, 69th Cong., 1st Sess., 18 (minority report). They regarded the exercise of such power to be "private censorship," which should be controlled by treating broadcasters as public utilities.[2] The provision that came closest to imposing an unlimited right of access to broadcast time was part of the bill reported to the Senate by the Committee on Interstate Commerce. The

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[2] Congressman Davis, for example, stated on the floor of the House the view that Congress found unacceptable:

"I do not think any member of the committee will deny that it is absolutely inevitable that we are going to have to regulate the radio public utilities just as we regulate other public utilities. We are going to have to regulate the rates and the service, and to force them to give equal service and equal treatment to all." 67 Cong. Rec. 5483 (1926). See also *id.,* at 5484.

bill that emerged from the Committee contained the following provision:

> "[I]f any licensee shall permit a broadcasting station to be used . . . by a candidate or candidates for any public office, *or for the discussion of any question affecting the public,* he shall make no discrimination as to the use of such broadcasting station, *and with respect to said matters the licensee shall be deemed a common carrier in interstate commerce:* Provided, that such licensee shall have no power to censor the material broadcast." 67 Cong. Rec. 12503 (1926) (emphasis added).

When the bill came to the Senate floor, the principal architect of the Radio Act of 1927, Senator Dill, offered an amendment to the provision to eliminate the common carrier obligation and to restrict the right of access to candidates for public office. Senator Dill explained the need for the amendment:

> "When we recall that broadcasting today is purely voluntary, and the listener-in pays nothing for it, that the broadcaster gives it for the purpose of building up his reputation, it seemed unwise to put the broadcaster under the hampering control of being a common carrier and compelled to accept anything and everything that was offered him so long as the price was paid." 67 Cong. Rec. 12502.

The Senators were also sensitive to the problems involved in legislating "equal opportunities" with respect to the discussion of public issues. Senator Dill stated:

> "['Public questions'] is such a general term that there is probably no question of any interest whatsoever that could be discussed but that the other side of it could demand time; and thus a radio station

> would be placed in the position that the Senator from Iowa mentions about candidates, namely, that they would have to give all their time to that kind of discussion, or no public question could be discussed." *Id.*, at 12504.

The Senate adopted Senator Dill's amendment. The provision finally enacted, § 18 of the Radio Act of 1927, 44 Stat. 1170, was later re-enacted as § 315 (a) of the Communications Act of 1934,[3] but only after Congress rejected another proposal that would have imposed a limited obligation on broadcasters to turn over their microphones to persons wishing to speak out on certain

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[3] Section 315 (a) now reads:

"If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

"(1) bona fide newscast,

"(2) bona fide news interview,

"(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

"(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

"shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 U. S. C. § 315 (a).

public issues.[4] Instead, Congress after prolonged consideration adopted § 3 (h), which specifically provides that "a person engaged in radio broadcasting shall not,

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[4] The Senate passed a provision stating that:

"[I]f any licensee shall permit any person to use a broadcasting station in support of or in opposition to any candidate for public office, *or in the presentation of views on a public question to be voted upon at an election, he shall afford equal opportunity to an equal number of other persons to use such station* in support of an opposing candidate for such public office, or to reply to a person who has used such broadcasting station in support of or in opposition to a candidate, *or for the presentation of opposite views on such public questions.*"

See Hearings on S. 2910 before the Senate Committee on Interstate Commerce, 73d Cong., 2d Sess., 19 (1934) (emphasis added). The provision for discussion of public issues was deleted by the House-Senate Conference. See H. R. Conf. Rep. No. 1918 on S. 3285, 73d Cong., 2d Sess., 49.

Also noteworthy are two bills offered in 1934 that would have restricted the control of broadcasters over the discussion of certain issues. Congressman McFadden proposed a bill that would have forbidden broadcasters to discriminate against programs sponsored by religious, charitable, or educational associations. H. R. 7986, 73d Cong., 2d Sess. The bill was not reported out of committee. And, during the debates on the 1934 Act, Senators Wagner and Hatfield offered an amendment that would have ordered the Commission to "reserve and allocate only to educational, religious, agricultural, labor, cooperative, and similar non-profit-making associations one-fourth of all the radio broadcasting facilities within its jurisdiction." 78 Cong. Rec. 8828. Senator Dill explained why the Committee had rejected the proposed amendment, indicating that the practical difficulties and the dangers of censorship were crucial:

"MR. DILL. . . . If we should provide that 25 percent of time shall be allocated to nonprofit organizations, someone would have to determine—Congress or somebody else—how much of the 25 percent should go to education, how much of it to religion, and how much of it to agriculture, how much of it to labor, how much of it to fraternal organizations, and so forth. When we enter this

insofar as such person is so engaged, be deemed a common carrier." [5]

Other provisions of the 1934 Act also evince a legislative desire to preserve values of private journalism under a regulatory scheme which would insure fulfillment of certain public obligations. Although the Commission was given the authority to issue renewable three-year licenses to broadcasters [6] and to promulgate rules and regulations governing the use of those licenses,[7] both con-

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field we must determine how much to give to the Catholics probably and how much to the Protestants and how much to the Jews." 78 Cong. Rec. 8843.

Senator Dill went on to say that the problem of determining the proper allocation of time for discussion of these subjects should be worked out by the Commission. *Id.*, at 8844. The Senate rejected the amendment. *Id.*, at 8846.

[5] Section 3 (h) provides as follows:

"'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 48 Stat. 1066, as amended, 47 U. S. C. § 153 (h).

[6] 48 Stat. 1083, as amended, 47 U. S. C. § 307.

[7] Section 303, 48 Stat. 1082, as amended, 47 U. S. C. § 303, provides in relevant part:

"Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

. . . . . .

"(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

. . . . . .

"(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter . . . ."

sistent with the "public convenience, interest, or necessity," § 326 of the Act specifically provides that:

> "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 47 U. S. C. § 326.

From these provisions it seems clear that Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations. Only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the Act. License renewal proceedings, in which the listening public can be heard, are a principal means of such regulation. See *Office of Communication of United Church of Christ* v. *FCC*, 123 U. S. App. D. C. 328, 359 F. 2d 994 (1966), and 138 U. S. App. D. C. 112, 425 F. 2d 543 (1969).

Subsequent developments in broadcast regulation illustrate how this regulatory scheme has evolved. Of particular importance, in light of Congress' flat refusal to impose a "common carrier" right of access for all persons wishing to speak out on public issues, is the Commission's "Fairness Doctrine," which evolved gradually over the years spanning federal regulation of the broadcast media.[8] Formulated under the Commission's power to

[8] In 1959, Congress amended § 315 of the Act to give statutory approval to the Fairness Doctrine. Act of Sept. 14, 1959, § 1, 73 Stat. 557, 47 U. S. C. § 315 (a).

For a summary of the development and nature of the Fairness Doctrine, see *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 375–386 (1969).

issue regulations consistent with the "public interest," the doctrine imposes two affirmative responsibilities on the broadcaster: coverage of issues of public importance must be adequate and must fairly reflect differing viewpoints. See *Red Lion,* 395 U. S., at 377. In fulfilling the Fairness Doctrine obligations, the broadcaster must provide free time for the presentation of opposing views if a paid sponsor is unavailable, *Cullman Broadcasting Co.,* 25 P & F Radio Reg. 895 (1963), and must initiate programming on public issues if no one else seeks to do so. See *John J. Dempsey,* 6 P & F Radio Reg. 615 (1950); *Red Lion, supra,* at 378.

Since it is physically impossible to provide time for all viewpoints, however, the right to exercise editorial judgment was granted to the broadcaster. The broadcaster, therefore, is allowed significant journalistic discretion in deciding how best to fulfill the Fairness Doctrine obligations,[9] although that discretion is bounded by rules designed to assure that the public interest in fairness is furthered. In its decision in the instant cases, the Commission described the boundaries as follows:

> "The most basic consideration in this respect is that the licensee cannot rule off the air coverage of important issues or views because of his private ends or beliefs. As a public trustee, he must present

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[9] See *Madalyn Murray,* 5 P & F Radio Reg. 2d 263 (1965). Factors that the broadcaster must take into account in exercising his discretion include the following:

"In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person [or group] making the request." Report on Editorializing by Broadcast Licensees, 13 F. C. C. 1246, 1251–1252 (1949).

> representative community views and voices on controversial issues which are of importance to his listeners. . . . This means also that some of the voices must be partisan. A licensee policy of excluding partisan voices and always itself presenting views in a bland, inoffensive manner would run counter to the 'profound national commitment that debate on public issues should be uninhibited, robust, and wide-open.' *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964); see also *Red Lion Broadcasting Co., Inc.* v. *F. C. C.*, 395 U. S. 367, 392 (n. 18) (1969) . . . ." 25 F. C. C. 2d, at 222–223.

Thus, under the Fairness Doctrine broadcasters are responsible for providing the listening and viewing public with access to a balanced presentation of information on issues of public importance.[10] The basic principle underlying that responsibility is "the right of the public to be informed, rather than any right on the part of the

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[10] The Commission has also adopted various component regulations under the Fairness Doctrine, the most notable of which are the "personal attack" and "political editorializing" rules which we upheld in *Red Lion*. The "personal attack" rule provides that "[w]hen, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person," the licensee must notify the person attacked and give him an opportunity to respond. *E. g.*, 47 CFR § 73.123. Similarly, the "political editorializing" rule provides that, when a licensee endorses a political candidate in an editorial, he must give other candidates or their spokesmen an opportunity to respond. *E. g., id.*, § 73.123.

The Commission, of course, has taken other steps beyond the Fairness Doctrine to expand the diversity of expression on radio and television. The chain broadcasting and multiple ownership rules are established examples. *E. g., id.*, §§ 73.131, 73.240. More recently, the Commission promulgated rules limiting television network syndication practices and reserving 25% of prime time for non-network programs. *Id.*, §§ 73.658 (j), (k).

Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter . . . ." Report on Editorializing by Broadcast Licensees, 13 F. C. C. 1246, 1249 (1949). Consistent with that philosophy, the Commission on several occasions has ruled that no private individual or group has a right to command the use of broadcast facilities.[11] See, *e. g., Dowie A. Crittenden,* 18 F. C. C. 2d 499 (1969); *Margaret Z. Scherbina,* 21 F. C. C. 2d 141 (1969); *Boalt Hall Student Assn.,* 20 F. C. C. 2d 612 (1969); *Madalyn Murray,* 40 F. C. C. 647 (1965); *Democratic State Central Committee of California,* 19 F. C. C. 2d 833 (1968); *U. S. Broadcasting Corp.,* 2 F. C. C. 208 (1935). Congress has not yet seen fit to alter that policy, although since 1934 it has amended the Act on several occasions[12] and considered various

[11] The Court of Appeals, respondents, and the dissent in this case have relied on dictum in *United Broadcasting Co.,* 10 F. C. C. 515 (1945), as illustrating Commission approval of a private right to purchase air time for the discussion of controversial issues. In that case the complaint alleged, not only that the station had a policy of refusing to sell time for the discussion of public issues, but also that the station had applied its policy in a discriminatory manner, a factor not shown in the cases presently before us. Furthermore, the decision was handed down four years before the Commission had fully developed and articulated the Fairness Doctrine. See Report on Editorializing by Broadcast Licensees, 13 F. C. C. 1246 (1949). Thus, even if the decision is read without reference to the allegation of discrimination, it stands as merely an isolated statement, made during the period in which the Commission was still working out the problems associated with the discussion of public issues; the dictum has not been followed since and has been modified by the Fairness Doctrine.

[12] In 1959, as noted earlier, Congress amended § 315 (a) of the Act to give statutory approval to the Commission's Fairness Doctrine. Act of Sept. 14, 1959, § 1, 73 Stat. 557, 47 U. S. C. § 315 (a). Very recently, Congress amended § 312 (a) of the 1934 Act to authorize the Commission to revoke a station license "for willful

proposals that would have vested private individuals with a right of access.[13]

With this background in mind, we next proceed to consider whether a broadcaster's refusal to accept editorial advertisements is governmental action violative of the First Amendment.

III

That "Congress shall make no law . . . abridging the freedom of speech, or of the press" is a restraint on government action, not that of private persons. *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 461 (1952). The Court has not previously considered whether the action of a broadcast licensee such as that challenged here is "governmental action" for purposes of the First

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or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." Campaign Communications Reform Act of 1972, Pub. L. 92–225, 86 Stat. 4. This amendment essentially codified the Commission's prior interpretation of § 315 (a) as requiring broadcasters to make time available to political candidates. *Farmers Union* v. *WDAY*, 360 U. S. 525, 534 (1959). See FCC Memorandum on Second Sentence of Section 315 (a), in Political Broadcasts—Equal Time, Hearings before Subcommittee of the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., on H. J. Res. 247, pp. 84–90.

[13] See, *e. g.*, H. R. 3595, 80th Cong., 1st Sess. (1947). A more recent proposal was offered by Senator Fulbright. His bill would have amended § 315 of the Act to provide:

"(d) Licensees shall provide a reasonable amount of public service time to authorized representatives of the Senate of the United States, and the House of Representatives of the United States, to present the views of the Senate and the House of Representatives on issues of public importance. The public service time required to be provided under this subsection shall be made available to each such authorized representative at least, but not limited to, four times during each calendar year." S. J. Res. 209, 91st Cong., 2d Sess. (1970).

Amendment. The holding under review thus presents a novel question, and one with far-reaching implications. See Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv. L. Rev. 768, 782–787 (1972).

The Court of Appeals held that broadcasters are instrumentalities of the Government for First Amendment purposes, relying on the thesis, familiar in other contexts, that broadcast licensees are granted use of part of the public domain and are regulated as "proxies" or " 'fiduciaries' of the people." 146 U. S. App. D. C., at 191, 450 F. 2d, at 652. These characterizations are not without validity for some purposes, but they do not resolve the sensitive constitutional issues inherent in deciding whether a particular licensee action is subject to First Amendment restraints.[14]

In dealing with the broadcast media, as in other contexts, the line between private conduct and governmental action cannot be defined by reference to any general formula unrelated to particular exercises of governmental authority. When governmental action is alleged there must be cautious analysis of the quality and degree of Government relationship to the particular acts in question. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722 (1961).

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[14] The dissent offers the same analysis as the Court of Appeals. As one distinguished commentator has recognized, this line of reasoning "stretch[es] the concept of state action very far." Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv. L. Rev. 768, 784 (1972). The notion that broadcasters are engaged in "governmental action" because they are licensed to utilize the "public" frequencies and because they are regulated is superficially appealing but, as Professor Jaffe observes, "not entirely satisfactory." *Id.*, at 783.

In deciding whether the First Amendment encompasses the conduct challenged here, it must be kept in mind that we are dealing with a vital part of our system of communication. The electronic media have swiftly become a major factor in the dissemination of ideas and information. More than 7,000 licensed broadcast stations undertake to perform this important function. To a large extent they share with the printed media the role of keeping people informed.

As we have seen, with the advent of radio a half century ago, Congress was faced with a fundamental choice between total Government ownership and control of the new medium—the choice of most other countries—or some other alternative. Long before the impact and potential of the medium was realized, Congress opted for a system of private broadcasters licensed and regulated by Government. The legislative history suggests that this choice was influenced not only by traditional attitudes toward private enterprise, but by a desire to maintain for licensees, so far as consistent with necessary regulation, a traditional journalistic role. The historic aversion to censorship led Congress to enact § 326 of the Act, which explicitly prohibits the Commission from interfering with the exercise of free speech over the broadcast frequencies. Congress pointedly refrained from divesting broadcasters of their control over the selection of voices; § 3 (h) of the Act stands as a firm congressional statement that broadcast licensees are not to be treated as common carriers, obliged to accept whatever is tendered by members of the public. Both these provisions clearly manifest the intention of Congress to maintain a substantial measure of journalistic independence for the broadcast licensee.[15]

[15] The dissenting view would appear to "want to have it both ways" on the question of Government control of the broadcast media. In finding governmental action, the dissent stresses what is per-

The regulatory scheme evolved slowly, but very early the licensee's role developed in terms of a "public trustee" charged with the duty of fairly and impartially informing the public audience. In this structure the Commission acts in essence as an "overseer," but the initial and primary responsibility for fairness, balance, and objectivity rests with the licensee. This role of the Government as an "overseer" and ultimate arbiter and guardian of the public interest and the role of the licensee as a journalistic "free agent" call for a delicate balancing of competing interests. The maintenance of this balance for more than 40 years has called on both the regulators and the licensees to walk a "tightrope" to preserve the First Amendment values written into the Radio Act and its successor, the Communications Act.

The tensions inherent in such a regulatory structure emerge more clearly when we compare a private newspaper with a broadcast licensee. The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers. A broadcast licensee has a large measure of journalistic freedom but not as large as that exercised by

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ceived as an "elaborate statutory scheme governing virtually all aspects of the broadcast industry." "Indeed," the dissent suggests, "federal agency review and guidance of broadcaster conduct is automatic, continuing, and pervasive." *Post*, at 176–177. Yet later in the dissent, when discussing the constitutional need for a right of access, the dissent objects to the substantial independence afforded broadcasters in covering issues of public importance. Thus, it is said that "broadcasters retain almost exclusive control over the selection of issues and viewpoints to be covered, the manner of presentation and, perhaps most important, who shall speak." *Post*, at 187.

a newspaper. A licensee must balance what it might prefer to do as a private entrepreneur with what it is required to do as a "public trustee." To perform its statutory duties, the Commission must oversee without censoring. This suggests something of the difficulty and delicacy of administering the Communications Act—a function calling for flexibility and the capacity to adjust and readjust the regulatory mechanism to meet changing problems and needs.

The licensee policy challenged in this case is intimately related to the journalistic role of a licensee for which it has been given initial and primary responsibility by Congress. The licensee's policy against accepting editorial advertising cannot be examined as an abstract proposition, but must be viewed in the context of its journalistic role. It does not help to press on us the idea that editorial ads are "like" commercial ads, for the licensee's policy against editorial spot ads is expressly based on a journalistic judgment that 10- to 60-second spot announcements are ill-suited to intelligible and intelligent treatment of public issues; the broadcaster has chosen to provide a balanced treatment of controversial questions in a more comprehensive form. Obviously the licensee's evaluation is based on its own journalistic judgment of priorities and newsworthiness.

Moreover, the Commission has not fostered the licensee policy challenged here; it has simply declined to command particular action because it fell within the area of journalistic discretion. The Commission explicitly emphasized that "there is of course no Commission policy thwarting the sale of time to comment on public issues." 25 F. C. C. 2d, at 226. The Commission's reasoning, consistent with nearly 40 years of precedent, is that so long as a licensee meets its "public trustee" obligation to provide balanced coverage of issues and events, it has broad discretion to decide how that obligation will be

met. We do not reach the question whether the First Amendment or the Act can be read to preclude the Commission from determining that in some situations the public interest requires licensees to re-examine their policies with respect to editorial advertisements. The Commission has not yet made such a determination; it has, for the present at least, found the policy to be within the sphere of journalistic discretion which Congress has left with the licensee.

Thus, it cannot be said that the Government is a "partner" to the action of the broadcast licensee complained of here, nor is it engaged in a "symbiotic relationship" with the licensee, profiting from the invidious discrimination of its proxy. Compare *Moose Lodge No. 107* v. *Irvis,* 407 U. S. 163, 174–177 (1972), with *Burton* v. *Wilmington Parking Authority,* 365 U. S., at 723–724. The First Amendment does not reach acts of private parties in every instance where the Congress or the Commission has merely permitted or failed to prohibit such acts.

Our conclusion is not altered merely because the Commission rejected the claims of BEM and DNC and concluded that the challenged licensee policy is not inconsistent with the public interest. It is true that in *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451 (1952), we found governmental action sufficient to trigger First Amendment protections on a record involving agency approval of the conduct of a public utility. Though we held that the decision of a District of Columbia bus company to install radio receivers in its public buses was within the reach of the First Amendment, there Congress had expressly authorized the agency to undertake plenary intervention into the affairs of the carrier and it was pursuant to that authorization that the agency investigated the challenged policy and approved it on public interest standards. *Id.,* at 462.

Here, Congress has not established a regulatory scheme for broadcast licensees as pervasive as the regulation of public transportation in *Pollak*. More important, as we have noted, Congress has affirmatively indicated in the Communications Act that certain journalistic decisions are for the licensee, subject only to the restrictions imposed by evaluation of its overall performance under the public interest standard. In *Pollak* there was no suggestion that Congress had considered worthy of protection the carrier's interest in exercising discretion over the content of communications forced on passengers. A more basic distinction, perhaps, between *Pollak* and this case is that *Pollak* was concerned with a transportation utility that itself derives no protection from the First Amendment. See *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166 (1948).

Were we to read the First Amendment to spell out governmental action in the circumstances presented here, few licensee decisions on the content of broadcasts or the processes of editorial evaluation would escape constitutional scrutiny. In this sensitive area so sweeping a concept of governmental action would go far in practical effect to undermine nearly a half century of unmistakable congressional purpose to maintain—no matter how difficult the task—essentially private broadcast journalism held only broadly accountable to public interest standards. To do this Congress, and the Commission as its agent, must remain in a posture of flexibility to chart a workable "middle course" in its quest to preserve a balance between the essential public accountability and the desired private control of the media.

More profoundly, it would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents. To do so in the name

of the First Amendment would be a contradiction. Journalistic discretion would in many ways be lost to the rigid limitations that the First Amendment imposes on Government. Application of such standards to broadcast licensees would be antithetical to the very ideal of vigorous, challenging debate on issues of public interest. Every licensee is already held accountable for the totality of its performance of public interest obligations.

The concept of private, independent broadcast journalism, regulated by Government to assure protection of the public interest, has evolved slowly and cautiously over more than 40 years and has been nurtured by processes of adjudication. That concept of journalistic independence could not co-exist with a reading of the challenged conduct of the licensee as governmental action. Nor could it exist without administrative flexibility to meet changing needs and swift technological developments. We therefore conclude that the policies complained of do not constitute governmental action violative of the First Amendment. See *McIntire* v. *William Penn Broadcasting Co.*, 151 F. 2d 597, 601 (CA3 1945), cert. denied, 327 U. S. 779 (1946); *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F. 2d 497 (CA1 1950); *Post* v. *Payton*, 323 F. Supp. 799, 803 (EDNY 1971).

IV

There remains for consideration the question whether the "public interest" standard of the Communications Act requires broadcasters to accept editorial advertisements or, whether, assuming governmental action, broadcasters are required to do so by reason of the First Amendment. In resolving those issues, we are guided by the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . ." *Red Lion*, 395 U. S., at 381. Whether

there are "compelling indications" of error in these cases must be answered by a careful evaluation of the Commission's reasoning in light of the policies embodied by Congress in the "public interest" standard of the Act. Many of those policies, as the legislative history makes clear, were drawn from the First Amendment itself; the "public interest" standard necessarily invites reference to First Amendment principles. Thus, the question before us is whether the various interests in free expression of the public, the broadcaster, and the individuals require broadcasters to sell commercial time to persons wishing to discuss controversial issues. In resolving that issue it must constantly be kept in mind that the interest of the public is our foremost concern. With broadcasting, where the available means of communication are limited in both space and time, the admonition of Professor Alexander Meiklejohn that "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said" is peculiarly appropriate. Political Freedom 26 (1948).

At the outset we reiterate what was made clear earlier that nothing in the language of the Communications Act or its legislative history compels a conclusion different from that reached by the Commission. As we have seen, Congress has time and again rejected various legislative attempts that would have mandated a variety of forms of individual access. That is not to say that Congress' rejection of such proposals must be taken to mean that Congress is opposed to private rights of access under all circumstances. Rather, the point is that Congress has chosen to leave such questions with the Commission, to which it has given the flexibility to experiment with new ideas as changing conditions require. In this case, the Commission has decided that on balance the undesirable effects of the right of access urged by respondents would outweigh the asserted benefits. The Court of

Appeals failed to give due weight to the Commission's judgment on these matters.

The Commission was justified in concluding that the public interest in providing access to the marketplace of "ideas and experiences" would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth. Cf. *Red Lion, supra,* at 392. Even under a first-come-first-served system, proposed by the dissenting Commissioner in these cases,[16] the views of the affluent could well prevail over those of others, since they would have it within their power to purchase time more frequently. Moreover, there is the substantial danger, as the Court of Appeals acknowledged, 146 U. S. App. D. C., at 203, 450 F. 2d, at 664, that the time allotted for editorial advertising could be monopolized by those of one political persuasion.

These problems would not necessarily be solved by applying the Fairness Doctrine, including the *Cullman* doctrine, to editorial advertising. If broadcasters were required to provide time, free when necessary, for the discussion of the various shades of opinion on the issue discussed in the advertisement, the affluent could still determine in large part the issues to be discussed. Thus, the very premise of the Court of Appeals' holding—that a right of access is necessary to allow individuals and groups the opportunity for self-initiated speech—would have little meaning to those who could not afford to purchase time in the first instance.[17]

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[16] See 25 F. C. C. 2d 216, 230, 234–235 (Johnson, dissenting).

[17] To overcome this inconsistency it has been suggested that a "submarket rate system" be established for those unable to afford the normal cost for air time. See Note, 85 Harv. L. Rev. 689, 695–696 (1972). That proposal has been criticized, we think justifiably, as raising "incredible administrative problems." Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv. L. Rev. 768, 789 (1972).

If the Fairness Doctrine were applied to editorial advertising, there is also the substantial danger that the effective operation of that doctrine would be jeopardized. To minimize financial hardship and to comply fully with its public responsibilities a broadcaster might well be forced to make regular programming time available to those holding a view different from that expressed in an editorial advertisement; indeed, BEM has suggested as much in its brief. The result would be a further erosion of the journalistic discretion of broadcasters in the coverage of public issues, and a transfer of control over the treatment of public issues from the licensees who are accountable for broadcast performance to private individuals who are not. The public interest would no longer be "paramount" but, rather, subordinate to private whim especially since, under the Court of Appeals' decision, a broadcaster would be largely precluded from rejecting editorial advertisements that dealt with matters trivial or insignificant or already fairly covered by the broadcaster. 146 U. S. App. D. C., at 196 n. 36, 197, 450 F. 2d, at 657 n. 36, 658. If the Fairness Doctrine and the *Cullman* doctrine were suspended to alleviate these problems, as respondents suggest might be appropriate, the question arises whether we would have abandoned more than we have gained. Under such a regime the congressional objective of balanced coverage of public issues would be seriously threatened.

Nor can we accept the Court of Appeals' view that every potential speaker is "the best judge" of what the listening public ought to hear or indeed the best judge of the merits of his or her views. All journalistic tradition and experience is to the contrary. For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Con-

gress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility—and civility—on the part of those who exercise the guaranteed freedoms of expression.

It was reasonable for Congress to conclude that the public interest in being informed requires periodic accountability on the part of those who are entrusted with the use of broadcast frequencies, scarce as they are. In the delicate balancing historically followed in the regulation of broadcasting Congress and the Commission could appropriately conclude that the allocation of journalistic priorities should be concentrated in the licensee rather than diffused among many. This policy gives the public some assurance that the broadcaster will be answerable if he fails to meet its legitimate needs. No such accountability attaches to the private individual, whose only qualifications for using the broadcast facility may be abundant funds and a point of view. To agree that debate on public issues should be "robust, and wide-open" does not mean that we should exchange "public trustee" broadcasting, with all its limitations, for a system of self-appointed editorial commentators.

The Court of Appeals discounted those difficulties by stressing that it was merely mandating a "modest reform," requiring only that broadcasters be required to accept some editorial advertising. 146 U. S. App. D. C., at 202, 450 F. 2d, at 663. The court suggested that broadcasters could place an "outside limit on the total amount of editorial advertising they will sell" and that the Commission and the broadcasters could develop " 'reasonable regulations' designed to prevent domination by a few groups or a few viewpoints." *Id.*, at 202,

203, 450 F. 2d, at 663, 664. If the Commission decided to apply the Fairness Doctrine to editorial advertisements and as a result broadcasters suffered financial harm, the court thought the "Commission could make necessary adjustments." *Id.*, at 203, 450 F. 2d, at 664. Thus, without providing any specific answers to the substantial objections raised by the Commission and the broadcasters, other than to express repeatedly its "confidence" in the Commission's ability to overcome any difficulties, the court remanded the cases to the Commission for the development of regulations to implement a constitutional right of access.

By minimizing the difficult problems involved in implementing such a right of access, the Court of Appeals failed to come to grips with another problem of critical importance to broadcast regulation and the First Amendment—the risk of an enlargement of Government control over the content of broadcast discussion of public issues. See, *e. g., Fowler* v. *Rhode Island,* 345 U. S. 67 (1953); *Niemotko* v. *Maryland,* 340 U. S. 268 (1951). This risk is inherent in the Court of Appeals' remand requiring regulations and procedures to sort out requests to be heard—a process involving the very editing that licensees now perform as to regular programming. Although the use of a public resource by the broadcast media permits a limited degree of Government surveillance, as is not true with respect to private media, see *National Broadcasting Co.* v. *United States,* 319 U. S., at 216–219, the Government's power over licensees, as we have noted, is by no means absolute and is carefully circumscribed by the Act itself.[18]

Under a constitutionally commanded and Government supervised right-of-access system urged by respondents and mandated by the Court of Appeals, the Commission

[18] See n. 8, *supra.*

would be required to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint and whether a particular viewpoint has already been sufficiently aired. Regimenting broadcasters is too radical a therapy for the ailment respondents complain of.

Under the Fairness Doctrine the Commission's responsibility is to judge whether a licensee's overall performance indicates a sustained good-faith effort to meet the public interest in being fully and fairly informed.[19] The Commission's responsibilities under a right-of-access system would tend to draw it into a continuing case-by-case determination of who should be heard and when. Indeed, the likelihood of Government involvement is so great that it has been suggested that the accepted constitutional principles against control of speech content would need to be relaxed with respect to editorial advertisements.[20] To sacrifice First Amendment protections for so speculative a gain is not warranted, and it was well within the Commission's discretion to construe the Act so as to avoid such a result.[21]

The Commission is also entitled to take into account the reality that in a very real sense listeners and viewers constitute a "captive audience." Cf. *Public Utilities Comm'n* v. *Pollak*, 343 U. S., at 463; *Kovacs* v. *Cooper*, 336 U. S. 77 (1949). The "captive" nature of the broadcast audience was recognized as early as 1924,

[19] See Report on Editorializing by Broadcast Licensees, 13 F. C. C., at 1251–1252.

[20] See Note, 85 Harv. L. Rev. 689, 697 (1973).

[21] DNC has urged in this Court that we at least recognize a right of our national parties to purchase air time for the purpose of discussing public issues. We see no principled means under the First Amendment of favoring access by organized political parties over other groups and individuals.

when Commerce Secretary Hoover remarked at the Fourth National Radio Conference that "the radio listener does not have the same option that the reader of publications has—to ignore advertising in which he is not interested—and he may resent its invasion of his set." [22] As the broadcast media became more pervasive in our society, the problem has become more acute. In a recent decision upholding the Commission's power to promulgate rules regarding cigarette advertising, Judge Bazelon, writing for a unanimous Court of Appeals, noted some of the effects of the ubiquitous commercial:

> "Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are 'in the air.' In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can *avoid* these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word." *Banzhaf* v. *FCC*, 132 U. S. App. D. C. 14, 32–33, 405 F. 2d 1082, 1100–1101 (1968), cert. denied, 396 U. S. 842 (1969).

It is no answer to say that because we tolerate pervasive commercial advertisements we can also live with its political counterparts.

The rationale for the Court of Appeals' decision imposing a constitutional right of access on the broadcast media was that the licensee impermissibly discriminates

[22] Reprinted in Hearings before the Senate Committee on Interstate Commerce on Radio Control, 69th Cong., 1st Sess., 54 (1926).

by accepting commercial advertisements while refusing editorial advertisements. The court relied on decisions holding that state-supported school newspapers and public transit companies were prohibited by the First Amendment from excluding controversial editorial advertisements in favor of commercial advertisements.[23] The court also attempted to analogize this case to some of our decisions holding that States may not constitutionally ban certain protected speech while at the same time permitting other speech in public areas. *Cox* v. *Louisiana*, 379 U. S. 536 (1965); *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951). This theme of "invidious discrimination" against protected speech is echoed in the briefs of BEM and DNC to this Court. Respondents also rely on our recent decisions in *Grayned* v. *City of Rockford*, 408 U. S. 104 (1972), and *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92 (1972), where we held unconstitutional city ordinances that permitted "peaceful picketing of any school involved in a labor dispute," *id.*, at 93, but prohibited demonstrations for any other purposes on the streets and sidewalks within 150 feet of the school.

Those decisions provide little guidance, however, in resolving the question whether the First Amendment requires the Commission to mandate a private right of access to the broadcast media. In none of those cases did the forum sought for expression have an affirmative and independent statutory obligation to provide full and fair coverage of public issues, such as Congress has imposed on

[23] *Lee* v. *Board of Regents of State Colleges*, 306 F. Supp. 1097 (WD Wis. 1969), aff'd, 441 F. 2d 1257 (CA7 1971); *Zucker* v. *Panitz*, 299 F. Supp. 102 (SDNY 1969); *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (SDNY 1967); *Hillside Community Church, Inc.* v. *City of Tacoma*, 76 Wash. 2d 63, 455 P. 2d 350 (1969); *Wirta* v. *Alameda-Contra Costa Transit District*, 68 Cal. 2d 51, 434 P. 2d 982 (1967).

all broadcast licensees. In short, there is no "discrimination" against controversial speech present in this case. The question here is not whether there is to be discussion of controversial issues of public importance on the broadcast media, but rather who shall determine what issues are to be discussed by whom, and when.

The opinion of the Court of Appeals asserted that the Fairness Doctrine, insofar as it allows broadcasters to exercise certain journalistic judgments over the discussion of public issues, is inadequate to meet the public's interest in being informed. The present system, the court held, "conforms . . . to a paternalistic structure in which licensees and bureaucrats decide what issues are 'important,' and how 'fully' to cover them, and the format, time and style of the coverage." 146 U. S. App. D. C., at 195, 450 F. 2d, at 656. The forced sale of advertising time for editorial spot announcements would, according to the Court of Appeals majority, remedy this deficiency. That conclusion was premised on the notion that advertising time, as opposed to programming time, involves a "special and separate mode of expression" because advertising content, unlike programming content, is generally prepared and edited by the advertiser. Thus, that court concluded, a broadcaster's policy against using advertising time for editorial messages "may well ignore opportunities to enliven and enrich the public's overall information." *Id.*, at 197, 450 F. 2d, at 658. The Court of Appeals' holding would serve to transfer a large share of responsibility for balanced broadcasting from an identifiable, regulated entity—the licensee—to unregulated speakers who could afford the cost.

We reject the suggestion that the Fairness Doctrine permits broadcasters to preside over a "paternalistic" regime. See *Red Lion*, 395 U. S., at 390. That doctrine admittedly has not always brought to the public perfect or, indeed, even consistently high-quality treatment of all

public events and issues; but the remedy does not lie in diluting licensee responsibility. The Commission stressed that, while the licensee has discretion in fulfilling its obligations under the Fairness Doctrine, it is required to "present representative community views and voices on controversial issues which are of importance to [its] listeners," and it is prohibited from "excluding partisan voices and always itself presenting views in a bland, inoffensive manner . . . ." 25 F. C. C. 2d, at 222. A broadcaster neglects that obligation only at the risk of losing his license.

Conceivably at some future date Congress or the Commission—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable. Indeed, the Commission noted in these proceedings that the advent of cable television will afford increased opportunities for the discussion of public issues. In its proposed rules on cable television the Commission has provided that cable systems in major television markets

> "shall maintain at least one specially designated, noncommercial public access channel available on a first-come, nondiscriminatory basis. The system shall maintain and have available for public use at least the minimal equipment and facilities necessary for the production of programming for such a channel." 37 Fed Reg. 3289, § 76.251 (a)(4).

For the present, the Commission is conducting a wide-ranging study into the effectiveness of the Fairness Doctrine to see what needs to be done to improve the coverage and presentation of public issues on the broadcast media. Notice of Inquiry in Docket 19260, 30 F. C. C. 2d 26, 36 Fed. Reg. 11825. Among other things, the study will attempt to determine whether "there is any feasible method of providing access for discussion of public issues

outside the requirements of the fairness doctrine." 30 F. C. C. 2d, at 33. The Commission made it clear, however, that it does not intend to discard the Fairness Doctrine or to require broadcasters to accept all private demands for air time.[24] The Commission's inquiry on this score was announced prior to the decision of the Court of Appeals in this case and hearings are under way.

The problems perceived by the Court of Appeals majority are by no means new; as we have seen, the history of the Communications Act and the activities of the Commission over a period of 40 years reflect a continuing search for means to achieve reasonable regulation compatible with the First Amendment rights of the public and the licensees. The Commission's pending hearings are but one step in this continuing process. At the very least, courts should not freeze this necessarily dynamic process into a constitutional holding. See *American Commercial Lines, Inc.* v. *Louisville & N. R. Co.*, 392 U. S. 571, 590–593 (1968).

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE STEWART, concurring.

While I join Parts I and II of the Court's opinion, and the opinion in Part III, my views closely approach those expressed by MR. JUSTICE DOUGLAS concurring in the judgment.

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[24] Subsequent to the announcement of the Court of Appeals' decision, the Commission expanded the scope of the inquiry to comply with the Court of Appeals' mandate. Further Notice of Inquiry in Docket 19260, 33 F. C. C. 2d 554, 37 Fed. Reg. 3383. After we granted certiorari and stayed the mandate of the Court of Appeals, the Commission withdrew that notice of an expanded inquiry and continued its study as originally planned. Order and Further Notice of Inquiry in Docket 19260, 33 F. C. C. 2d 798, 37 Fed. Reg. 4980.

The First Amendment prohibits the Government from imposing controls upon the press.[1] Private broadcasters are surely part of the press. *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166. Yet here the Court of Appeals held, and the dissenters today agree, that the First Amendment *requires* the Government to impose controls upon private broadcasters—in order to preserve First Amendment "values." The appellate court accomplished this strange convolution by the simple device of holding that private broadcasters *are* Government. This is a step along a path that could eventually lead to the proposition that private *newspapers* "are" Government. Freedom of the press would then be gone. In its place we would have such governmental controls upon the press as a majority of this Court at any particular moment might consider First Amendment "values" to require. It is a frightening specter.

I

There is some first-blush appeal in seeking out analogies from areas of the law where governmental involvement on the part of otherwise private parties has led the Court to hold that certain activities of those parties were tantamount to governmental action.[2] The evolution of the "state action" concept under the Fourteenth Amendment is one available analogy.[3] Another is the decision of this

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[1] U. S. Const., Amdt. I, provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

[2] See *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U. S. 308; *Railway Employes' Dept.* v. *Hanson*, 351 U. S. 225; *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451; *Marsh* v. *Alabama*, 326 U. S. 501.

[3] "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental

Court in *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, where a policy of a privately owned but publicly regulated bus company that had been approved by the regulatory commission was held to activate First Amendment review. The First Amendment has also been held applicable where private parties control essentially public forums. *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U. S. 308, *Marsh* v. *Alabama*, 326 U. S. 501; cf. *Lloyd Corp.* v. *Tanner*, 407 U. S. 551.

The problem before us, however, is too complex to admit of solution by simply analogizing to cases in very different areas. For we deal here with the electronic press, that is itself protected from Government by the First Amendment.[4] Before woodenly accepting analogies from cases dealing with quasi-public racial discrimination, regulated industries other than the press, or "company towns," we must look more closely at the structure of broadcasting and the limits of governmental regulation of licensees.

When Congress enacted the Radio Act of 1927, 44 Stat. 1162, and followed it with the Federal Communications Act of 1934, 48 Stat. 1064, 47 U. S. C. § 151 *et seq.*, it was responding to a then-evident need to regulate access to the public airwaves. Not every member of the public could broadcast over the air as he chose, since the scarcity

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character as to become subject to the constitutional limitations placed upon state action." *Evans* v. *Newton*, 382 U. S. 296, 299. Earlier, in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, the Court held that a privately owned restaurant located within a public parking garage was sufficiently involved with state authority to bring its racially discriminatory actions within the proscription of the Fourteenth Amendment.

[4] See, *e. g.*, *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166. The Federal Communications Act also prohibits the Commission from interfering with "the right of free speech by means of radio communication." 47 U. S. C. § 326.

of frequencies made this a sure road to chaos.[5] The system selected by the Congress was a hybrid. The Federal Radio Commission (succeeded by the Federal Communications Commission), was to license broadcasters for no more than three-year periods. 47 U. S. C. § 307 (d). The licensees, though subject to some public regulation, were to be private companies.

Scarcity meant more than a need to limit access. Because access was to be limited, it was thought necessary for the regulatory apparatus to take into account the public interest in obtaining "the best practicable service to the community reached by his [the licensee's] broadcasts." *FCC* v. *Sanders Brothers Radio Station,* 309 U. S. 470, 475. Public regulation has not, then, been merely a matter of electromagnetic engineering for the sake of keeping signals clear. It has also included some regulation of programming. Writing in defense of Commission regulations regarding chain broadcasting, Mr. Justice Frankfurter said: "These provisions [of the Act], individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the 'larger and more effective use of radio in the public interest.'" *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 217.

Over time, federal regulation of broadcasting in the public interest has been extensive, and, *pro tanto,* has rightly or wrongly been held to be tolerable under the First Amendment. We now have the Fairness Doctrine, with its personal-attack, editorial-reply, and fair-coverage-of-controversial-issue requirements.[6] In *Red Lion Broad-*

[5] For a history of regulatory legislation regarding broadcasters, see *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 375–386; *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 210–214.

[6] The personal-attack and editorial-reply rules appear at 47 CFR §§ 73.123, 73.300, 73.598, 73.679. The public issue aspect of the

casting Co. v. *FCC*, 395 U. S. 367, this Doctrine was held to constitute permissible governmental regulation of broadcasters, despite the First Amendment. The Court said:

> "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. . . .
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> . . . . .
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> ". . . Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.*, at 388, 390.

The Fairness Doctrine has been held applicable to paid advertising as well as to other programming, *Banzhaf* v. *FCC*, 132 U. S. App. D. C. 14, 405 F. 2d 1082. And the public interest in broadcasting has been recognized as a rationale for liberalized standing on the part of listener

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Fairness Doctrine requires the broadcaster to give adequate coverage to public issues, fairly reflecting divergent views. *United Broadcasting Co.*, 10 F. C. C. 515; *New Broadcasting Co.*, 6 P & F Radio Reg. 258; see generally Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415. This coverage must be provided at the broadcaster's own expense if necessary, *Cullman Broadcasting Co.*, 25 P & F Radio Reg. 895, and the duty must be met by providing programming obtained at the licensee's own initiative if it is available from no other source. *John J. Dempsey*, 6 P & F Radio Reg. 615.

groups in Commission licensing proceedings. *Office of Communication of United Church of Christ* v. *FCC*, 123 U. S. App. D. C. 328, 359 F. 2d 994.

Throughout this long history of regulation, however, it has been recognized that broadcasters retain important freedoms, and that the Commission's regulatory power has limits. Quite apart from what may be required by the First Amendment itself, the regulatory legislation makes clear what some of these freedoms are. Section 3 (h) of the Act, 47 U. S. C. § 153 (h), provides that broadcasters are not to be treated as common carriers. Were broadcasters common carriers within the meaning of the Act, they would be subject to 47 U. S. C. §§ 201, 202. Section 201 provides, in pertinent part, that:

> "(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor . . . ."

Section 202 provides that:

> "(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

The Act also specifically gives licensees "freedom of speech":

> "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals

> transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 47 U. S. C. § 326.

Thus, when examined as a whole, the Federal Communications Act establishes a system of privately owned broadcast licensees. These licensees, though regulated by the Commission under a fairly broad "public interest" standard, have, quite apart from whatever additional protections the First Amendment may provide, important statutory freedoms in conducting their programming.

In *Red Lion, supra,* this Court held that, despite the First Amendment, the Commission may impose a so-called Fairness Doctrine upon broadcasters, requiring them to present balanced coverage of various and conflicting views on issues of public importance. I agreed with the Court in *Red Lion,* although with considerable doubt, because I thought that that much Government regulation of program content was within the outer limits of First Amendment tolerability. Were the Commission to require broadcasters to accept some amount of editorial advertising as part of the public interest mandate upon which their licenses are conditional, the issue before us would be in the same posture as was the Fairness Doctrine itself in *Red Lion,* and we would have to determine whether this additional governmental control of broadcasters was consistent with the statute and tolerable under the First Amendment. Here, however, the Commission imposed no such requirement, but left private broadcasters free to accept or reject such advertising as they saw fit. The Court of Appeals held that the First Amendment *compels* the Commission to require broadcasters to accept such advertising, because it equated broadcaster action with governmental action.

This holding not only raises a serious statutory question under § 3 (h) of the Act, which provides that broadcasters are not common carriers, but seems to me to reflect an extraordinarily odd view of the First Amendment.

The dissenting opinion today argues, in support of the decision of the Court of Appeals, that only a *limited* right of access is sought by the respondents and required by the First Amendment, and that such a limited right would not turn broadcasters into common carriers. The respondents argue, somewhat differently, that the Constitution requires that only "responsible" individuals and groups be given the right to purchase advertising. These positions are said to be arrived at by somehow balancing "competing First Amendment values." But if private broadcasters *are* Government, how can the First Amendment give only a *limited* right to those who would speak? Since when has the First Amendment given Government the right to silence all speakers it does not consider "responsible?"

The First Amendment protects the press *from* governmental interference; it confers no analogous protection *on* the Government.[7] To hold that broadcaster action is governmental action would thus simply strip broadcasters of their own First Amendment rights. They would be obligated to grant the demands of all citizens to be heard over the air, subject only to reasonable regulations as to "time, place and manner." Cf. *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 98; *Cox* v. *Louisiana*,

[7] Government is not restrained by the First Amendment from controlling its own expression, cf. *New York Times Co.* v. *United States*, 403 U. S. 713, 728–729 (STEWART, J., concurring). As Professor Thomas Emerson has written, "The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents." The System of Freedom of Expression 700 (1970).

379 U. S. 536, 554; *Poulos* v. *New Hampshire*, 345 U. S. 395; *Cox* v. *New Hampshire*, 312 U. S. 569. If, as the dissent today would have it, the proper analogy is to public forums [8]—that is, if broadcasters are Government for First Amendment purposes—then broadcasters are inevitably drawn to the position of common carriers. For this is precisely the status of Government with respect to public forums—a status mandated by the First Amendment.[9]

To hold that broadcaster action is governmental action would thus produce a result wholly inimical to the broadcasters' own First Amendment rights, and wholly at odds with the broadcasting system established by Congress and with our many decisions [10] approving those legislative

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[8] "[T]he right to speak can flourish only if it is allowed to operate in an effective forum—whether it be a public park, a schoolroom, a town meeting hall, a soapbox, or a radio and television frequency." *Post*, at 193.

[9] Professor Emerson has recognized the scope of the "access" argument: "The licensee therefore can only be considered as the agent of the government, or trustee of the public, in a process of further allocation. Hence the licensee would have no direct First Amendment rights of his own, except as to his own expression." *Supra*, n. 7, at 663.

Though the licensee would be free to say what it wished during its *own* broadcasting, whatever that might mean, it seems clear that the licensee would have no special claim to broadcast time and would lose entirely the freedom to program and schedule according to its own judgment, values, and priorities. Cf. *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 98; *Cox* v. *Louisiana*, 379 U. S. 536, 554; *Poulos* v. *New Hampshire*, 345 U. S. 395; *Cox* v. *New Hampshire*, 312 U. S. 569. Licensees would be forced to develop a procedurally fair and substantively nondiscriminatory system for controlling access, and in my view this is precisely what Congress intended to avoid through § 3 (h) of the Act.

[10] *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367; *National Broadcasting Co.* v. *United States*, 319 U. S. 190; *FCC* v. *Sanders Brothers Radio Station*, 309 U. S. 470; *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134.

provisions.[11] As Judge McGowan wrote, dissenting from the judgment of the Court of Appeals in these cases,

> "This is the system which Congress has, wisely or not, provided as the alternative to public ownership and operation of radio and television communications facilities. This approach has never been thought to be other than within the permissible limits of constitutional choice." 146 U. S. App. D. C. 181, 205, 450 F. 2d 642, 666.

II

Part IV of the Court's opinion, as I understand it, seems primarily to deal with the respondents' statutory argument—that the obligation of broadcasters to operate in the "public interest" supports the judgment of the Court of Appeals. Yet two of my concurring Brethren understand Part IV as a discussion of the First Amendment issue that would exist in these cases were the action of broadcasters to be equated with governmental action. So, according to my Brother BLACKMUN, "the governmental action issue does not affect the outcome of this case." *Post,* at 148. The Court of Appeals also conflated the constitutional and statutory issues in these cases. It reasoned that whether its decision "is styled as a 'First Amendment decision' or as a decision interpreting the fairness and public interest requirements 'in light of the First Amendment' matters little." 146 U. S. App. D. C., at 188, 450 F. 2d, at 649.

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[11] None of this suggests any disagreement on my part with the evolution of "state action" under the Fourteenth Amendment. I recognize that if *Moose Lodge No. 107* v. *Irvis,* 407 U. S. 163, were relevant, the fact that the Commission considered and rejected a challenge to broadcaster policy might be sufficient to constitute "state action." This, in fact, was the basis of the Court's decision in *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451.

I find this reasoning quite wrong and wholly disagree with it, for the simple reason that the First Amendment and the public interest standard of the statute are not coextensive. The two are related in the sense that the Commission could not "in the public interest" place a requirement on broadcasters that constituted a violation of their First Amendment rights. The two are also related in the sense that both foster free speech. But we have held that the Commission can under the statute require broadcasters to do certain things "in the public interest" that the First Amendment would not require if the broadcasters *were* the Government. For example, the Fairness Doctrine is an aspect of the "public interest" regulation of broadcasters that would not be compelled or even permitted by the First Amendment itself if broadcasters were the Government.[12]

If the "public interest" language of the statute were intended to enact the substance of the First Amendment, a discussion of whether broadcaster action is governmental action would indeed be superfluous. For anything that Government could not do because of the First Amendment, the broadcasters could not do under the statute. But this theory proves far too much, since it would make the statutory scheme, with its emphasis on

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[12] The basis for a Fairness Doctrine is statutory, not constitutional. As the Court said in *Red Lion:*

"In light of the fact that the 'public interest' in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public; the fact that the FCC has rested upon that language from its very inception a doctrine that these issues must be discussed, and fairly; and the fact that Congress has acknowledged that the analogous provisions of § 315 are not preclusive in this area, and knowingly preserved the FCC's complementary efforts, we think the fairness doctrine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority." 395 U. S., at 385.

broadcaster discretion and its proscription on interference with "the right of free speech by means of radio communication," a nullity. Were the Government really operating the electronic press, it would, as my Brother DOUGLAS points out, be *prevented* by the First Amendment from selection of broadcast content and the exercise of editorial judgment. It would not be permitted in the name of "fairness" to deny time to any person or group on the grounds that their views had been heard "enough." Yet broadcasters perform precisely these functions and enjoy precisely these freedoms under the Act. The constitutional and statutory issues in these cases are thus quite different.

In evaluating the statutory claims, the starting point must be the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . ." *Red Lion*, 395 U. S., at 381.

Though I have no doubt that the respondents here were attempting to communicate what they considered to be important messages, it does not follow that the Commission erred when it refused to require every broadcaster to communicate those messages. Contrary to what is said in dissent today, it is not the case that a seller of goods is granted instant access to the media, while someone "seeking to discuss war, peace, pollution, or the suffering of the poor is denied this right to speak." *Post*, at 200. There is no indication that the thousands of broadcasters regulated by the Commission have anything like a uniform policy of turning down "controversial" or "editorial" advertising. In the cases before us, the Business Executives' spot advertisements were rejected by a single radio station. Of the three television networks, only one turned down the Democratic National Committee's request for air time. We are told that many, if not most, broadcasters *do* accept advertising of

the type at issue here. This variation in broadcaster policy reflects the very kind of diversity and competition that best protects the free flow of ideas under a system of broadcasting predicated on private management.[13]

Even though it would be in the public interest for the respondents' advertisements to be heard, it does not follow that the public interest requires *every* broadcaster to broadcast them. And it certainly does not follow that the public interest would be served by *forcing* every broadcaster to accept any particular kind of advertising. In the light of these diverse broadcaster policies—and the serious First Amendment problem that a contrary ruling would have presented—there are surely no "compelling indications" that the Commission misunderstood its statutory responsibility.

III

There is never a paucity of arguments in favor of limiting the freedom of the press. The Court of Appeals concluded that greater Government control of press freedom is acceptable here because of the scarcity of frequencies for broadcasting. But there are many more broadcasting stations than there are daily newspapers.[14] And it

[13] The Democratic National Committee cited this very lack of uniformity as a reason for seeking a declaratory ruling from the Commission. There was too much diversity, it thought, for it to plan effectively an advertising campaign. In the DNC's request for a declaratory ruling before the Commission, it stated:

"In addition to the three national commercial networks, as of April 1, 1970, there were, on the air, 509 commercial VHF television stations, 180 commercial UHF stations, 4,280 standard broadcast stations, and 2,111 commercial FM stations. While several of these stations have common owners, it does not necessarily follow that every station owned by an individual or group would follow the same policies."

[14] There are 1,792 daily newspapers in the United States. Ayer Directory of Publications VIII (1973). Compare the number of broadcasters, n. 13, *supra*.

would require no great ingenuity to argue that newspapers too *are* Government. After all, newspapers get Government mail subsidies and a limited antitrust immunity.[15] The reasoning of the Court of Appeals would then lead to the conclusion that the First Amendment requires that newspapers, too, be compelled to open their pages to all comers.

Perhaps I overstate the logic of the opinion of the Court of Appeals. Perhaps its "balancing" of First Amendment "values" would require no more than that newspapers be compelled to give "limited" access to dissident voices, and then only if those voices were "responsible." And perhaps it would require that such access be compelled only when there was a single newspaper in a particular community. But it would be a close question for me which of these various alternative results would be more grossly violative of the First Amendment's guarantee of a free press. For that guarantee gives *every* newspaper the liberty to print what it chooses and reject what it chooses, free from the intrusive editorial thumb of Government.

I profoundly trust that no such reasoning as I have attributed to the Court of Appeals will ever be adopted by this Court. And if I have exaggerated, it is only to make clear the dangers that beset us when we lose sight of the First Amendment itself, and march forth in blind pursuit of its "values."

Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that "fairness" was far too fragile to be left for a Government bureaucracy to accom-

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[15] Newspapers and other periodicals receive a Government subsidy in the form of second-class postage rates, 39 CFR § 132. An antitrust immunity is established by the Newspaper Preservation Act, 15 U. S. C. § 1801 *et seq.*

plish. History has many times confirmed the wisdom of their choice.

This Court was persuaded in *Red Lion* to accept the Commission's view that a so-called Fairness Doctrine was required by the unique electronic limitations of broadcasting, at least in the then-existing state of the art. Rightly or wrongly, we there decided that broadcasters' First Amendment rights were "abridgeable." But surely this does not mean that those rights are nonexistent. And even if all else were in equipoise, and the decision of the issue before us were finally to rest upon First Amendment "values" alone, I could not agree with the Court of Appeals. For if those "values" mean anything, they should mean at least this: If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom.

MR. JUSTICE WHITE, concurring.

I join Parts I, II, and IV of the Court's opinion and its judgment. I do not, however, concur in the Part III opinion.

I do not suggest that the conduct of broadcasters must always, or even often, be considered that of a government for the purposes of the First Amendment. But it is at least arguable, and strongly so, that the Communications Act and the policies of the Commission, including the Fairness Doctrine, are here sufficiently implicated to require review of the Commission's orders under the First Amendment. For myself, the heart of the argument is simply stated. The claim in these cases was that the Communications Act and the First Amendment should be interpreted to confer a right of access on those who wished to buy time for editorial advertising and to raise political funds. The Commission rejected both the statutory and constitutional positions. To confer a right

of access, it said, would be contrary to the Communications Act and to the policies adopted by the Commission to implement that Act. Congress intended that the Fairness Doctrine be complied with, but it also intended that broadcasters have wide discretion with respect to the method of compliance. There is no requirement that broadcasters accept editorial ads; they could, instead, provide their own programs, with their own format, opinion and opinion sources. Congress intended that there be no *right* of access such as claimed in these cases; and, in the Commission's view, to recognize that right would require major revisions in statutory and regulatory policy. The Commission also ruled, contrary to the views of its dissenting member, that rejection of the asserted right of access was wholly consistent with the First Amendment.

In this context I am not ready to conclude, as is done in the Part III opinion, that the First Amendment may be put aside for lack of official action necessary to invoke its proscriptions. But, assuming, *arguendo,* as the Court does in Part IV of its opinion, that Congress or the Commission is sufficiently involved in the denial of access to the broadcasting media to require review under the First Amendment, I would reverse the judgment of the Court of Appeals. Given the constitutionality of the Fairness Doctrine, and accepting Part IV of the Court's opinion, I have little difficulty in concluding that statutory and regulatory recognition of broadcaster freedom and discretion to make up their own programs and to choose their method of compliance with the Fairness Doctrine is consistent with the First Amendment.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE POWELL joins, concurring.

In Part IV the Court determines "whether, assuming governmental action, broadcasters are required" to ac-

cept editorial advertisements "by reason of the First Amendment." *Ante*, at 121. The Court concludes that the Court of Appeals erred when it froze the "continuing search for means to achieve reasonable regulation compatible with the First Amendment rights of the public and the licensees" into "a constitutional holding." *Ante*, at 132. The Court's conclusion that the First Amendment does not compel the result reached by the Court of Appeals demonstrates that the governmental action issue does not affect the outcome of this case. I therefore refrain from deciding it.

MR. JUSTICE DOUGLAS, concurring in the judgment.

While I join the Court in reversing the judgment below, I do so for quite different reasons.

My conclusion is that TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines. The philosophy of the First Amendment requires that result, for the fear that Madison and Jefferson had of government intrusion is perhaps even more relevant to TV and radio than it is to newspapers and other like publications. That fear was founded not only on the spectre of a lawless government but of government under the control of a faction that desired to foist its views of the common good on the people. In popular terms that view has been expressed as follows:

> "The ground rules of our democracy, as it has grown, require a free press, not necessarily a responsible or a temperate one. There aren't any halfway stages. As Aristophanes saw, democracy means that power is generally conferred on second-raters by third-raters, whereupon everyone else, from first-raters to fourth-raters, moves with great glee to try to dislodge them. It's messy but most politicians under-

stand that it can't very well be otherwise and still be a democracy." Stewart, reviewing Epstein, News From Nowhere: Television and the News (1972), Book World, Washington Post, March 25, 1973, pp. 4–5.

I

Public broadcasting, of course, raises quite different problems from those tendered by the TV outlets involved in this litigation.

Congress has authorized the creation of the Corporation for Public Broadcasting, whose Board of Directors is appointed by the President by and with the advice and consent of the Senate. 47 U. S. C. § 396. A total of 223 television and 560 radio stations made up this nationwide public broadcasting system as of June 30, 1972. See 1972 Corporation for Public Broadcasting Annual Report. It is a nonprofit organization and by the terms of § 396 (b) is said not to be "an agency or establishment of the United States Government." Yet, since it is a creature of Congress whose management is in the hands of a Board named by the President and approved by the Senate, it is difficult to see why it is not a federal agency engaged in operating a "press" as that word is used in the First Amendment. If these cases involved that Corporation, we would have a situation comparable to that in which the United States owns and manages a prestigious newspaper like the New York Times, Washington Post, or Sacramento Bee. The Government as owner and manager would not, as I see it, be free to pick and choose such news items as it desired. For by the First Amendment it may not censor or enact or enforce any other "law" abridging freedom of the press. Politics, ideological slants, rightist or leftist tendencies could play no part in its design of programs. See Markel, Will It be Public or Private TV?, World, Mar. 13, 1973, p. 57;

Shales, WGBH–TV: An Ultimatum Against "Improper" White House Influence, Washington Post, Apr. 27, 1973, p. E2. More specifically, the programs tendered by the respondents in the present cases could not then be turned down.

Governmental action may be evidenced by various forms of supervision or control of private activities. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715. I have expressed the view that the activities of licensees of the government operating in the public domain are governmental actions, so far as constitutional duties and responsibilities are concerned. See *Garner* v. *Louisiana*, 368 U. S. 157, 183–185 (concurring); *Lombard* v. *Louisiana*, 373 U. S. 267, 281 (concurring); *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 179 (dissenting). It is somewhat the same idea expressed by the first Mr. Justice Harlan in his dissent in *Plessy* v. *Ferguson*, 163 U. S. 537, 554. But that view has not been accepted. If a TV or radio licensee were a federal agency, the thesis of my Brother BRENNAN would inexorably follow. For a licensee of the Federal Government would be in precisely the situation of the Corporation for Public Broadcasting. A licensee, like an agency of the Government, would within limits of its time be bound to disseminate all views. For, being an arm of the Government, it would be unable by reason of the First Amendment to "abridge" some sectors of thought in favor of others. The Court does not, however, decide whether a broadcast licensee is a federal agency within the context of these cases.

II

If a broadcast licensee is not engaged in governmental action for purposes of the First Amendment, I fail to see how constitutionally we can treat TV and radio differently than we treat newspapers. It would come

as a surprise to the public as well as to publishers and editors of newspapers to be informed that a newly created federal bureau would hereafter provide "guidelines" for newspapers or promulgate rules that would give a federal agency power to ride herd on the publishing business to make sure that fair comment on all current issues was made. In 1970 Congressman Farbstein introduced a bill,[1] never reported out of the Committee, which provided that any newspaper of general circulation published in a city with a population greater than 25,000 and in which only one separately owned newspaper of general circulation is published "shall provide a reasonable opportunity for a balanced presentation of conflicting views on issues of public importance" and giving the Federal Communications Commission power to enforce the requirement.

Thomas I. Emerson, our leading First Amendment scholar, has stated that:

> "[A]ny effort to solve the broader problems of a monopoly press by forcing newspapers to cover all 'newsworthy' events and print all viewpoints, under the watchful eyes of petty public officials, is likely to undermine such independence as the press now shows without achieving any real diversity." The System of Freedom of Expression 671 (1970).

The sturdy people who fashioned the First Amendment would be shocked at that intrusion of Government into a field which in this Nation has been reserved for individuals, whatever part of the spectrum of opinion they represent. Benjamin Franklin, one of the Founders who was in the newspaper business, wrote in simple and graphic form what I had always assumed was the basic

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[1] H. R. 18927, 91st Cong., 2d Sess.

American newspaper tradition that became implicit in the First Amendment. In our early history one view was that the publisher must open his columns

> "to any and all controversialists, especially if paid for it. Franklin disagreed, declaring that his newspaper was not a stagecoach, with seats for everyone; he offered to print pamphlets for private distribution, but refused to fill his paper with private altercations." [2] F. Mott, American Journalism 55 (3d ed. 1962).

It is said that TV and radio have become so powerful and exert such an influence on the public mind that they must be controlled by Government.[3] Some

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[2] Congress provided in 47 U. S. C. § 153 (h) that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

[3] "To say that the media have great decisionmaking powers without defined legal responsibilities or any formal duties of public accountability is both to overestimate their power and to put forth a meaningless formula for reform. How shall we make the *New York Times* 'accountable' for its anti-Vietnam policy? Require it to print letters to the editor in support of the war? If the situation is as grave as stated, the remedy is fantastically inadequate. But the situation is not that grave. The *New York Times*, the *Chicago Tribune*, NBC, ABC, and CBS play a role in policy formation, but clearly they were not alone responsible, for example, for Johnson's decision not to run for re-election, Nixon's refusal to withdraw the troops from Vietnam, the rejection of the two billion dollar New York bond issue, the defeat of Carswell and Haynsworth, or the Supreme Court's segregation, reapportionment and prayer decisions. The implication that the people of this country—except the proponents of the theory—are mere unthinking automatons manipulated by the media, without interests, conflicts, or prejudices is an assumption which I find quite maddening. The development of constitutional doctrine should not be based on such hysterical overestimation of media power and underestimation of the good sense of the American public." Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv. L. Rev. 768, 786–787 (1972).

newspapers in our history have exerted a powerful—and some have thought—a harmful interest on the public mind. But even Thomas Jefferson, who knew how base and obnoxious the press could be, never dreamed of interfering. For he thought that government control of newspapers would be the greater of two evils.[4]

> "I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them. . . . These ordures are rapidly depraving the public taste.
>
> "It is however an evil for which there is no remedy, our liberty depends on the freedom of the press, and that cannot be limited without being lost."

Of course there is private censorship in the newspaper field. But for one publisher who may suppress a fact, there are many who will print it. But if the Government is the censor, administrative *fiat*, not freedom of choice, carries the day.

As stated recently by Harry Kalven, Jr.:

> "It is an insufficiently noticed aspect of the First Amendment that it contemplates the vigorous use of self-help by the opponents of given doctrines, ideas, and political positions. It is not the theory that all ideas and positions are entitled to flourish under freedom of discussion. It is rather then that they must survive and endure against hostile criticism. There is perhaps a paradox in that the suppression of speech by speech is part and parcel of the principle of freedom of speech. Indeed, one big reason why policy dictates that government keep its hands off communication is that, in this area, self-help of criticism is singularly effective. . . .
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> "Free, robust criticism of government, its officers, and its policy is the essence of the democratic

[4] T. Jefferson, Democracy 150–151 (Padover ed. 1939).

dialectic—of 'the belief,' again to quote Brandeis, 'in the power of reason as applied through public discussion.' The government cannot reciprocally criticize the performance of the press, its officers, and its policies without its criticism carrying implications of power and coercion. The government simply cannot be another discussant of the press's performance. Whether it will it or not, it is a critic who carries the threat of the censor and more often than not it wills it. Nor is it at all clear that its voice will be needed; surely there will be others to champion its view of the performance of the press.

"The balance struck, then, is avowedly, and even enthusiastically, one-sided. The citizen may criticize the performance and motives of his government. The government may defend its performance and its policies, but it may not criticize the performance and motives of its critics." 6 The Center Magazine, No. 3, pp. 36–37 (May/June 1973).

Red Lion Broadcasting Co. v. *FCC*, 395 U. S. 367, in a carefully written opinion that was built upon predecessor cases, put TV and radio under a different regime. I did not participate in that decision and, with all respect, would not support it. The Fairness Doctrine has no place in our First Amendment regime. It puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or its benevolent ends. In 1973—as in other years—there is clamoring to make TV and radio emit the messages that console certain groups. There are charges that these mass media are too slanted, too partisan, too hostile in their approach to candidates and the issues.

The same cry of protest has gone up against the newspapers and magazines. When Senator Joseph Mc-

Carthy was at his prime, holding in his hand papers containing the names of 205 "Communists" in the State Department (R. Feuerlicht, Joe McCarthy and McCarthyism 54 (1972)), there were scarcely a dozen papers in this Nation that stood firm for the citizen's right to due process and to First Amendment protection. That, however, was no reason to put the saddle of the federal bureaucracy on the backs of publishers. Under our Bill of Rights people are entitled to have extreme ideas, silly ideas, partisan ideas.

The same is true, I believe, of TV and radio. At times they have a nauseating mediocrity. At other times they show the dazzling brilliance of a Leonard Bernstein; and they very often bring humanistic influences of faraway people into every home.

Both TV and radio news broadcasts frequently tip the news one direction or another and even try to turn a public figure into a character of disrepute. Yet so do the newspapers and the magazines and other segments of the press. The standards of TV, radio, newspapers, or magazines—whether of excellence or mediocrity—are beyond the reach of Government. Government—acting through courts—disciplines lawyers. Government makes criminal some acts of doctors and of engineers. But the First Amendment puts beyond the reach of Government federal regulation of news agencies save only business or financial practices which do not involve First Amendment rights. Conspicuous is *Associated Press* v. *United States*, 326 U. S. 1, where enforcement of the antitrust laws against a news-gathering agency was held to be not inconsistent with First Amendment rights.

Government has no business in collating, dispensing, and enforcing, subtly or otherwise, any set of ideas on the press. Beliefs, proposals for change, clamor for controls, protests against any governmental regime are pro-

tected by the First Amendment against governmental ban or control.

There has been debate over the meaning of the First Amendment as applied to the States by reason of the Fourteenth. Some have thought that at the state level the First Amendment was somewhat "watered down" and did not have the full vigor which it had as applied to the Federal Government. See *Roth* v. *United States*, 354 U. S. 476, 502–503 (Harlan, J., concurring). So far, that has been the minority view. See *Malloy* v. *Hogan*, 378 U. S. 1, 10. But it is quite irrelevant here, for the First Amendment, like other parts of the Bill of Rights, was at the outset applicable only to the Federal Government.[5] The First Amendment is written in terms that are absolute. Its command is that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

That guarantee, can, of course, be changed by a constitutional amendment which can make all the press or segments of the press organs of Government and thus control the news and information which people receive. Such a restructuring of the First Amendment cannot be done by judicial fiat or by congressional action. The ban of "no" law that abridges freedom of the press is in my view total and complete.[6] The Alien and Sedition Acts, 1 Stat. 566, 570, 596, passed early in our history were

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[5] *Barron* v. *Mayor of Baltimore*, 7 Pet. 243.

[6] The press in this country, like that of Britain, was at one time subject to contempt for its comments on pending litigation. *Toledo Newspaper Co.* v. *United States*, 247 U. S. 402. But that position was changed. See *Bridges* v. *California*, 314 U. S. 252, 267. Federal habeas corpus, however, is available to give a man his freedom and the prosecution an opportunity for a new trial where the conduct of the press has resulted in an unfair trial. *Sheppard* v. *Maxwell*, 384 U. S. 333. And change of venue may be had where the local atmosphere has saturated the community with prejudice. See *Rideau* v. *Louisiana*, 373 U. S. 723.

plainly unconstitutional, as Jefferson believed. Jefferson, indeed, said that by reason of the First Amendment

> "libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals. That therefore the act of the Congress of the United States, passed on the 14th of July, 1798, entitled 'An Act in Addition to the Act entitled "An Act for the Punishment of certain Crimes against the United States,"' which does abridge the freedom of the press, is not law, but is altogether void, and of no force." 4 J. Elliot's Debates on the Federal Constitution 541 (1876).

And see 15 Writings of Thomas Jefferson 214 (Memorial ed. 1904); 14 *id.*, at 116; 11 *id.*, at 43–44.

Those Acts had but a short life, and we never returned to them. We have, however, witnessed a slow encroachment by Government over that segment of the press that is represented by TV and radio licensees. Licensing is necessary for engineering reasons; the spectrum is limited and wavelengths must be assigned to avoid stations interfering[7] with each other. *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S., at 388. The Commission has a duty to encourage a multitude of voices but only in

[7] The Senate Report which accompanied the bill that became the Radio Act of 1927, 44 Stat. 1162 stated:

"If the channels of radio transmission were unlimited in number the importance of the regulatory body would be greatly lessened, but these channels are limited and restricted in number and the decision as to who shall be permitted to use them and on what terms and for what periods of time, together with the other questions connected with the situation, requires the exercise of a high order of discretion and the most careful application of the principles of equitable treatment to all the classes and interests affected. For these and other reasons your committee decided that all power to regulate radio communication should be centered in one independent body, a radio commission, granting it full and complete authority over the entire subject of radio." S. Rep. 772, 69th Cong., 1st Sess., 3.

a limited way, *viz.*, by preventing monopolistic practices and by promoting technological developments that will open up new channels.[8] But censorship[9] or editing or the screening by Government of what licensees may broadcast goes against the grain of the First Amendment.

The Court in *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 226, said, "Unlike other modes of

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[8] Scarcity may soon be a constraint of the past, thus obviating the concerns expressed in *Red Lion*. It has been predicted that it may be possible within 10 years to provide television viewers 400 channels through the advances of cable television. R. Smith, The Wired Nation 7 (1972); see *Brandywine-Main Line Radio, Inc.* v. *FCC*, 153 U. S. App. D. C. 305, 362–365, 473 F. 2d 16, 73–76 (Bazelon, J., dissenting).

[9] Currently, press censorship covers most of the globe. In Brazil the present regime of censorship is pervasive. As reported in the New York Times for Feb. 17, 1973, p. 11:

"The censors' rules, issued a few months ago and constantly amended, cover a vast field and if strictly applied would leave the press little to discuss. In practice, however, much depends on the whims and suspicions of the local censors.

"General prohibitions include protests against censorship, any discussion of a successor to President Emilio Garrastazu Médici, whose term is up in 1974, campaigns against the Government's special powers by decree and sensational news that might hurt the image of Brazil.

"Others are campaigns to discredit the national housing program, the financial market or other matters of vital importance to the Government, the playing up of assaults on banks or credit establishments, tension between the Roman Catholic Church and the state, agitation in union and student circles, and publicity for Communist personalities and nations. Criticism of state governors and 'exaltation of immorality' through news of homosexuality, prostitution and drugs are also barred.

"The most controversial order, issued by the Minister of Justice last September, bans all news, comment or interviews on a political relaxation of the regime, on democracy for Brazil, and on the economic and financial situation in general."

expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation."

That uniqueness is due to engineering and technical problems. But the press in a realistic sense is likewise not available to all. Small or "underground" papers appear and disappear; and the weekly is an established institution. But the daily papers now established are unique in the sense that it would be virtually impossible for a competitor to enter the field due to the financial exigencies of this era. The result is that in practical terms the newspapers and magazines, like TV and radio, are available only to a select few. Who at this time would have the folly to think he could combat the New York Times or Denver Post by building a new plant and becoming a competitor? That may argue for a redefinition of the responsibilities of the press in First Amendment terms.[10] But I do not think it gives us

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[10] Indeed, it can be argued that the existence of newspapers, and thus their access to the public, is dependent upon the preferential mailing privileges newspapers receive through second-class postage rates. This is a privilege afforded by the Government, and, as my Brother STEWART recognizes, a form of subsidy.

Under the Postal Reorganization Act, the new Postal Rate Commission is empowered to fix postage rates at levels high enough to make each class of mail pay its own way. John Fischer reports that the increase in second-class mail rates for magazines and periodicals (127%) is "nothing less than a death sentence for an unpredictable number of publications." The Easy Chair, Harper's Magazine 30, 31 (May 1973). It is not the established giants of the publishing field that will suffer most, for it is estimated that some 10,000 magazines and small newspapers will be forced out of existence. *Id.*, at 30. Fischer mentions specifically the National Review, Human Events, The Nation, and The New Republic. These are the publications that offer us the rich diversity of opinion and

carte blanche to design systems of supervision and control or empower Congress to read the mandate in the First Amendment that "Congress shall make no law . . . abridging the freedom . . . of the press" to mean that Congress may, acting directly or through any of its agencies such as the FCC make "some" laws "abridging" freedom of the press.

Powerful arguments, summarized and appraised in T. Emerson, The System of Freedom of Expression, cc. XVII and XVIII (1970), can be made for revamping or reconditioning the system. The present one may be largely aligned on the side of the status quo. The problem implicates our educational efforts which are bland and conformist and the pressures on the press, from political and from financial sources, to foist boilerplate points of view on our people rather than to display the diversities of ideologies and culture in a world which, as Buckminster Fuller said, has been "communized" by the radio.

What kind of First Amendment would best serve our needs as we approach the 21st century may be an open question. But the old-fashioned First Amendment that we have is the Court's only guideline; and one hard and fast principle which it announces is that Government

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reporting the First Amendment is designed to promote and protect. As Senator McGee, Chairman of the Post Office and Civil Service Committee, has said: "I believe that the American public generally has a vested interest in the survival of newspapers and magazines. Regardless of the economic, political, or social policies which they espouse, they contribute to the nation's thought process. I am personally convinced that the Congress should not permit magazines to go under because the cost of distributing them through the postal system is higher than their readers are willing to pay." *Id.*, at 32.

In addition to the benefits of reduced postage rates, newspapers have been afforded a limited antitrust exemption. Newspaper Preservation Act, 15 U. S. C. § 1801 *et seq.*

shall keep its hands off the press. That principle has served us through days of calm and eras of strife and I would abide by it until a new First Amendment is adopted. That means, as I view it, that TV and radio, as well as the more conventional methods for disseminating news, are all included in the concept of "press" as used in the First Amendment and therefore are entitled to live under the laissez-faire regime which the First Amendment sanctions.

The issues presented in these cases are momentous ones. TV and radio broadcasters have mined millions by selling merchandise, not in selling ideas across the broad spectrum of the First Amendment. But some newspapers have done precisely the same, loading their pages with advertisements; they publish, not discussions of critical issues confronting our society, but stories about murders, scandal, and slanderous matter touching the lives of public servants who have no recourse due to *New York Times Co.* v. *Sullivan*, 376 U. S. 254. Commissioner Johnson of the FCC wrote in the present case a powerful dissent. He said:

> "Although the First Amendment would clearly ban governmental censorship of speech content, government must be concerned about the procedural rules that control the public forums for discussion. If someone—a moderator, or radio-television licensee—applies rules that give one speaker, or viewpoint, less time (or none at all) to present a position, then a censorship exists as invidious as outright thought control. There is little doubt in my mind that for any given forum of speech the First Amendment *demands* rules permitting as many to speak and be heard as possible. And if this Commission does not enact them, then the courts must require them." 25 F. C. C. 2d 216, 232.

But the prospect of putting Government in a position of control over publishers is to me an appalling one, even to the extent of the Fairness Doctrine. The struggle for liberty has been a struggle against Government. The essential scheme of our Constitution and Bill of Rights was to take Government off the backs of people. Separation of powers was one device. An independent judiciary was another device. The Bill of Rights was still another. And it is anathema to the First Amendment to allow Government any role of censorship over newspapers, magazines, books, art, music, TV, radio, or any other aspect of the press. There is unhappiness in some circles at the impotence of Government. But if there is to be a change, let it come by constitutional amendment. The Commission has an important role to play in curbing monopolistic practices, in keeping channels free from interference, in opening up new channels as technology develops. But it has no power of censorship.

It is said, of course, that Government can control the broadcasters because their channels are in the public domain in the sense that they use the airspace that is the common heritage of all the people. But parks are also in the public domain. Yet people who speak there do not come under Government censorship. *Lovell* v. *Griffin*, 303 U. S. 444, 450–453; *Hague* v. *CIO*, 307 U. S. 496, 515-516. It is the tradition of Hyde Park, not the tradition of the censor, that is reflected in the First Amendment. TV and radio broadcasters are a vital part of the press; and since the First Amendment allows no Government control over it, I would leave this segment of the press to its devices.

Licenses are, of course, restricted in time and while, in my view, Congress has the power to make each license limited to a fixed term and nonreviewable, there is no power to deny renewals for editorial or ideological rea-

sons. The reason is that the First Amendment gives no preference to one school of thought over others.[11]

The Court in today's decision by endorsing the Fairness Doctrine sanctions a federal saddle on broadcast licensees that is agreeable to the traditions of nations that never have known freedom of press [12] and that is tolerable in countries that do not have a written constitution containing prohibitions as absolute as those in the First Amendment. Indeed after these cases were argued the FCC instituted a "non-public" inquiry [13] to

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[11] Judge Bazelon, dissenting in *Brandywine-Main Line Radio, Inc.* v. *FCC*, 153 U. S. App. D. C., at 358–359, 473 F. 2d, at 69–70, said: "WXUR was no doubt devoted to a particular religious and political philosophy; but it was also a radio station devoted to speaking out and stirring debate on controversial issues. The station was purchased by Faith Theological Seminary to propagate a viewpoint which was not being heard in the greater Philadelphia area. The record is clear that through its interview and call-in shows it *did* offer a variety of opinions on a broad range of public issues; and that it never refused to lend its broadcast facilities to spokesmen of conflicting viewpoints.

"The Commission's strict rendering of fairness requirements, as developed in its decision, has removed WXUR from the air. This has deprived the listening public not only of a viewpoint but also of robust debate on innumerable controversial issues. It is beyond dispute that the public has *lost* access to information and ideas. This is not a loss to be taken lightly, however unpopular or disruptive we might judge these ideas to be." (Footnotes omitted.)

[12] If Eastern European experience since World War II is any criterion, the newspapers are pretty much the company paper in the huge company (Communist) nation. The easiest target, however, seems to be TV where the input can be carefully controlled and "prime time" filled with tapes of official meetings, political speeches, and the tedious accounts of achievement of the workers. See Morgan, Press Obedience in East Europe, Washington Post, May 19, 1973, p. A14.

[13] FCC Order No. 73–331, 39 Fed. Reg. 8301 (Mar. 27, 1973).

determine whether any broadcaster or cablecaster has broadcast " 'obscene, indecent or profane language' in violation of" 18 U. S. C. § 1464.

In April 1973, the FCC fined Sonderling Broadcasting Corp., which operates station WGLD in Oak Park, Illinois, for allowing "obscene" conversations on a telephone "talk show." It used *Roth* v. *United States*, 354 U. S. 476, *Memoirs* v. *Massachusetts*, 383 U. S. 413, and *Ginzburg* v. *United States*, 383 U. S. 463, as supplying the criteria for broadcasting. It fined the corporation $2,000 under 18 U. S. C. § 1464, which reads, "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

Commissioner Johnson dissented, saying that the FCC prefers "to sit as an omniscient programming review board, allegedly capable of deciding what is and is not good for the American public to see and hear"; and that when the FCC bars a particular program it casts "a pall over the entire broadcasting industry" for the reason that the licensees "fear the potential loss of their highly profitable broadcast licenses." That, he concluded, creates a "chilling effect" which has "enormous proportions" and reaches "all forms of broadcast expression."

We ourselves have, of course, made great inroads on the First Amendment of which obscenity is only one of the many examples. So perhaps we are inching slowly toward a controlled press. But the regime of federal supervision under the Fairness Doctrine is contrary to our constitutional mandate and makes the broadcast licensee an easy victim of political pressures and reduces him to a timid and submissive segment of the press whose measure of the public interest will now be echoes of the dominant political voice that emerges after every election. The affair with freedom of which we have been

proud will now bear only a faint likeness of our former robust days.

III

I said that it would come as a surprise to the public as well as to publishers and editors of newspapers to learn that they were under a newly created federal bureau. Perhaps I should have said that such an event *should* come as a surprise. In fact it might not in view of the retrogressive steps we have witnessed.

We have allowed ominous inroads to be made on the historic freedom of the newspapers. The effort to suppress the publication of the Pentagon Papers failed only by a narrow margin and actually succeeded for a brief spell in imposing prior restraint on our press for the first time in our history. See *New York Times Co.* v. *United States,* 403 U. S. 713.

In recent years the admonition of Mr. Justice Black that the First Amendment gave the press freedom so that it might "serve the governed, not the governors" (*id.*, at 717) has been disregarded.

"The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell." *Ibid.*

The right of the people to know has been greatly undermined by our decisions requiring, under pain of contempt, a reporter to disclose the sources of the information he comes across in investigative reporting. *Branzburg* v. *Hayes,* 408 U. S. 665.

The Boston Globe reports: [14]

> "In the last two years at least 20 Federal Grand Juries have been used to investigate radical or anti-war dissent. With the power of subpoena, the proceedings secret, and not bound by the rules of evidence required in open court, they have a lot more leverage than, for example, the old House Un-American Activities Committee."

Many reporters have been put in jail, a powerful weapon against investigative reporting. As the Boston Globe states, "in reality what is being undermined here is press freedom itself." [15]

In the same direction is the easy use of the stamp "secret" or "top secret" which the Court recently approved in *Environmental Protection Agency* v. *Mink*, 410 U. S. 73. That decision makes a shambles of the Freedom of Information Act. In tune with the other restraints on the press are provisions of the new proposed Rules of Evidence which the Court recently sent to Congress. Proposed Rule 509 (b) provides:

> "The government has a privilege to refuse to give evidence and to prevent any person from giving evidence upon a showing of reasonable likelihood of danger that the evidence will disclose a secret of state or official information, as defined in this rule."

Under the statute if Congress does not act,[16] this new regime of secrecy will be imposed on the Nation and the

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[14] The People's Need to Know, Editorial Series, Jan. 21–27, 1973, reprinted from Boston Globe, p. 12.

[15] *Id.*, at 13.

[16] By reason of an Act of Congress of Mar. 30, 1973, the Rules of Evidence—and amendments to the Rules of Civil Procedure and to the Rules of Criminal Procedure (which we sent up Nov. 20, 1972, and Dec. 18, 1972)—will have no force or effect except to the extent that Congress expressly approves. 87 Stat. 9.

right of people to know will be further curtailed. The proposed code sedulously protects the Government; it does not protect newsmen. It indeed pointedly omits any mention of the privilege of newsmen to protect their confidential sources.

These growing restraints on newspapers have the same ominous message that the overtones of the present opinion have on TV and radio licensees.

The growing specter of governmental control and surveillance over all activities of people makes ominous the threat to liberty by those who hold the executive power. Over and over again, attempts have been made to use the Commission as a political weapon against the opposition, whether to the left or to the right.

Experience has shown that unrestrained power cannot be trusted to serve the public weal even though it be in governmental hands. The fate of the First Amendment should not be so jeopardized.[17] The constitutional mandate that the Government shall make "no law" abridging freedom of speech and the press is clear; the orders and rulings of the Commission are covered by that ban; and it must be carefully confined lest broadcasting—now our most powerful media—be used to subdue the minorities or help produce a Nation of people who walk submissively to the executive's notions of the public good.

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[17] Alexander Bickel has spurned the "total agnosticism" that allows the First Amendment to have its way because "who really knows, after all, what is true or false, evil or good, noxious or wholesome." The Press and Government: Adversaries Without Absolutes, Freedom at Issue 5 (May-June 1973). He attributes this view to Mr. Justice Holmes. He would place at least partial responsibility with the Government for determining the "good counsels and wholesome doctrine." *Ibid.* But, it was precisely the mistrust of the evanescent, narrow, factional views of those in power and the belief that no one has a patent on the "truth" that underlay the First Amendment.

Mills v. *Alabama*, 384 U. S. 214, involved a prosecution of a newspaper editor for publishing, contrary to a state statute, an editorial on election day urging the voters to vote against the existing city commission and to replace it with a mayor-council government. This Court, speaking through Mr. Justice Black, reversed the judgment saying:

> "[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free. The Alabama Corrupt Practices Act by providing criminal penalties for publishing editorials such as the one here silences the press at a time when it can be most effective. It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press." *Id.*, at 219.

I would apply the same test to TV or radio.[18]

[18] The monetary and other burdens imposed on the press by the right of a criticized person to reply, like the traditional damage remedy for libel, lead of course to self-censorship respecting matters of importance to the public that the First Amendment denies the Government the power to impose. The burdens certainly are as onerous as the indirect restrictions on First Amendment rights which we have struck down: (1) the requirement that a bookseller examine the contents of his shop, *Smith* v. *California*, 361 U. S. 147 (1959); (2) the requirement that a magazine publisher investigate his advertisers, *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478, 492–493

What Walter Lippman wrote about President Coolidge's criticism of the press has present relevancy. Coolidge, he said, had

> " 'declared for peace, good-will, understanding moderation; disapproved of conquest, aggression, exploitation; pleaded for a patriotic press, for a free press; denounced a narrow and bigoted nationalism, and announced that he stood for law, order, protection of life, property, respect for sovereignty and principle of international law. Mr. Coolidge's catalog of the virtues was complete except for one virtue. . . . That is the humble realization that God has not endowed Calvin Coolidge with an infallible power to determine in each concrete case exactly what is right, what is just, what is patriotic. . . . Did he recognize this possibility he would not continue to lecture the press in such a way as to make it appear that when newspapers oppose him they are unpatriotic, and that when they support him they do so not because they think his case is good but because they blindly support him. Mr. Coolidge's notion . . . would if it were accepted by the American press reduce it to utter triviality.' " J. Luskin, Lippman, Liberty, and the Press 60 (1972).

(1962) (opinion of Harlan, J.); (3) the requirement that names and addresses of sponsors be printed on handbills, *Talley* v. *California*, 362 U. S. 60 (1960); (4) the requirement that organizations supply membership lists, *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539 (1963); *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U. S. 293 (1961); *Bates* v. *City of Little Rock*, 361 U. S. 516 (1960); *NAACP* v. *Alabama*, 357 U. S. 449 (1958); and (5) the requirement that individuals disclose organizational membership, *Shelton* v. *Tucker*, 364 U. S. 479 (1960). In each instance we held the restriction unconstitutional on the ground that it discouraged or chilled constitutionally protected rights of speech, press, or association.

The same political appetite for oversight of most segments of the press has markedly increased since the bland days of Calvin Coolidge.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL concurs, dissenting.

These cases require us to consider whether radio and television broadcast licensees may, with the approval of the Federal Communications Commission,[1] refuse *absolutely* to sell any part of their advertising time to groups or individuals wishing to speak out on controversial issues of public importance. In practical effect, the broadcaster policy here under attack permits airing of only those paid presentations which advertise products or deal with "noncontroversial" matters, while relegating the discussion of controversial public issues to formats such as documentaries, the news, or panel shows, which are tightly controlled and edited by the broadcaster. The Court holds today that this policy—including the *absolute* ban on the sale of air time for the discussion of controversial issues—is consistent with the "public interest" requirements of the Communications Act of 1934, 47 U. S. C. §§ 307 (d), 309 (a).[2] The Court also holds that the

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[1] See *Business Executives Move for Vietnam Peace*, 25 F. C. C. 2d 242 (1970); *Democratic National Committee*, 25 F. C. C. 2d 216 (1970).

[2] I do not *specifically* address the "statutory" question in this case because, in practical effect, the considerations underlying the "statutory" question are in many respects similar to those relevant to the "substance" of the "constitutional" claim. There is one aspect of the Court's "statutory" discussion, however, that merits at least brief attention. In upholding the absolute ban on the sale of editorial advertising, the Court relies heavily upon 47 U. S. C. § 153 (h), which declares that broadcasters shall not be deemed "common carriers." In my view, this reliance is misplaced. Even a cursory examination of the legislative history of this provision reveals that it was enacted in recognition of the fact that

challenged policy does not violate the First Amendment. It is noteworthy that, in reaching this result, the Court does *not* hold that there is insufficient "governmental involvement" in the promulgation and enforcement of the challenged ban to activate the commands of the First Amendment. On the contrary, only THE CHIEF JUSTICE, and my Brothers STEWART and REHNQUIST express the view that the First Amendment is inapplicable to this case. My Brothers WHITE, BLACKMUN, and POWELL quite properly do not decide that question, for they find that the broadcaster policy here under attack does not violate the "substance" of the First Amendment. Similarly, there is no majority for the *holding* that the challenged ban does not violate the "substance" of the First Amendment. For, although THE CHIEF JUSTICE, and my Brother REHNQUIST purport to "decide" that question, their disposition of the "governmental involvement" issue necessarily renders their subsequent discussion of the "substantive" question mere dictum.

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traditional doctrines governing true "common carriers," such as transportation companies, would not suit the particular problems of radio broadcasting. Specifically, it was feared that such "common carrier" status for broadcasters would mean that they "would have to give *all* their time to [public issues]." 67 Cong. Rec. 12504 (Sen. Dill) (emphasis added); see also *ibid.* (Sen. Broussard); *id.*, at 12356 (Sen. Fess). Section 153 (h) was intended solely to assure that broadcasters would not be required to surrender *all* of their air time to willing purchasers; it does not bear upon the question whether they may be required to sell a *reasonable and limited* amount of air time to members of the public for discussion of controversial issues. See 2 Z. Chafee, Government and Mass Communications 635 n. 75 (1947). Indeed, the Commission itself has rejected the Court's interpretation of § 153 (h) when it declared, over 25 years ago, that "the operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues . . . is inconsistent with the concept of public interest established by the Communications Act. . . ." *United Broadcasting Co.*, 10 F. C. C. 515, 518 (1945).

In my view, the principle at stake here is one of fundamental importance, for it concerns the people's right to engage in and to hear vigorous public debate on the broadcast media. And balancing what I perceive to be the competing interests of broadcasters, the listening and viewing public, and individuals seeking to express their views over the electronic media, I can only conclude that the exclusionary policy upheld today can serve only to inhibit, rather than to further, our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964). I would therefore affirm the determination of the Court of Appeals that the challenged broadcaster policy is violative of the First Amendment.

I

The command of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press" is, on its face, directed at governmental rather than private action. Nevertheless, our prior decisions make clear that "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon [governmental] action." *Evans* v. *Newton*, 382 U. S. 296, 299 (1966). Thus, the reach of the First Amendment depends not upon any formalistic "private-public" dichotomy but, rather, upon more functional considerations concerning the extent of governmental involvement in, and public character of, a particular "private" enterprise. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the [Government] in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722 (1961); see *Moose Lodge No. 107* v.

Irvis, 407 U. S. 163, 172 (1972). And because of the inherent complexity of this case-by-case inquiry, "[t]his Court has never attempted the 'impossible task' of formulating an infallible test" for determining in all instances whether particular conduct must be deemed private or governmental. *Reitman* v. *Mulkey*, 387 U. S. 369, 378 (1967); see *Kotch* v. *Pilot Comm'rs*, 330 U. S. 552, 556 (1947).

This does not mean, of course, that our prior experience in this area offers no guidance for the purposes of our present inquiry. On the contrary, our previous decisions have focused on myriad indicia of "governmental action," many of which are directly applicable to the operations of the broadcast industry.[3] As the Court of Appeals recognized, "the general characteristics of the broadcast industry reveal an extraordinary relationship between the broadcasters and the federal government—a relationship which puts that industry in a class with few others." 146 U. S. App. D. C. 181, 190, 450 F. 2d 642, 651. More specifically, the public nature of the airwaves, the governmentally created preferred status of broadcast licensees, the pervasive federal regulation of broadcast programming, and the Commission's specific approval of the challenged broadcaster policy combine in this case to bring the promulgation and enforcement of that policy within the orbit of constitutional imperatives.

At the outset, it should be noted that both radio and television broadcasting utilize a natural resource—the electromagnetic spectrum[4]—that is part of the public

[3] See generally *Business Executives Move for Vietnam Peace*, 25 F. C. C. 2d, at 253–264 (dissenting opinion), wherein Commissioner Johnson identified no less than eight separate indicia of "governmental action" involved in the promulgation and enforcement of the challenged broadcaster policy.

[4] For a discussion of the attributes of the electromagnetic spectrum, see generally W. Jones, Regulated Industries 1019 (1967); Levin, The Radio Spectrum Resource, 11 J. Law & Econ. 433 (1968).

domain. And, although broadcasters are granted the temporary use of this valuable resource for terminable three-year periods, "ownership" and ultimate control remain vested in the people of the United States. Thus, § 301 of the Communications Act of 1934, 47 U. S. C. § 301, specifically provides:

> "It is the purpose of this [Act] . . . to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. . . ."

Such public "ownership" of an essential element in the operations of a private enterprise is, of course, an important and established indicium of "governmental involvement." In *Burton* v. *Wilmington Parking Authority, supra,* for example, we emphasized the fact of "public ownership" in holding the proscriptions of the Fourteenth Amendment applicable to a privately owned restaurant leasing space in a building owned by the State.[5]

[5] It is true, of course, that unlike the State in *Burton,* the Federal Government here does not receive substantial financial compensation for the use of the "public" property. See *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715, 723–724 (1961); *Moose Lodge No. 107* v. *Irvis,* 407 U. S. 163, 174–175 (1972). Nevertheless, the absence of such a financial arrangement represents, in practical effect, Government subsidization of broadcasters, thereby enhancing the degree of governmental involvement. Cf. Kalven, Broadcasting, Public Policy and the First Amendment, 10 J. Law & Econ. 15, 31 (1967). Moreover, as in *Burton,* the publicly owned property is "not surplus state property" but, rather, constitutes an "integral and, indeed, indispensable part" of the governmental scheme. *Burton* v. *Wilmington Parking Authority, supra,* at 723. See also 47 U. S. C. § 303 (g).

In reaching that result, we explained that, in part because of the "public ownership" of the building, the State "has elected to place its power, property and prestige behind the" actions of the privately owned restaurant. 365 U. S., at 725. And, viewing the relationship in its entirety, we concluded that "[t]he State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity. . . ." *Ibid.;* see also *Moose Lodge No. 107* v. *Irvis, supra,* at 172–173, 175; *Turner* v. *City of Memphis,* 369 U. S. 350 (1962); *Kissinger* v. *New York City Transit Authority,* 274 F. Supp. 438 (SDNY 1967); *Farmer* v. *Moses,* 232 F. Supp. 154 (SDNY 1964).

A second indicium of "governmental involvement" derives from the direct dependence of broadcasters upon the Federal Government for their "right" to operate broadcast frequencies. There can be no doubt that, for the industry as a whole, governmental regulation alone makes "radio communication possible by . . . limiting the number of licenses so as not to overcrowd the spectrum." *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 389 (1969).[6] Moreover, with respect to individual licensees, it is equally clear that "existing broadcasters have often attained their present position," not as a result of free market pressures[7] but, rather, "because of their initial government selection. . . ." *Id.,* at 400. Indeed, the "quasi-monopolistic" advantages enjoyed by broadcast licensees "are the fruit of a preferred position conferred by the Government." *Ibid.*

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[6] For a discussion of the Fairness Doctrine and its relevance to this case, see text and notes, at nn. 15–34, *infra.*

[7] Indeed, the Communications Act of 1934 makes it a criminal offense to operate a broadcast transmitter without a license. See 47 U. S. C. § 501. Thus, the Federal Government specifically insulates the licensee from any real threat of economic competition.

Thus, as MR. CHIEF JUSTICE (then Judge) BURGER has himself recognized, "[a] broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." *Office of Communication of United Church of Christ* v. *FCC*, 123 U. S. App. D. C. 328, 337, 359 F. 2d 994, 1003 (1966). And, along these same lines, we have consistently held that "when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself." *American Communications Assn.* v. *Douds*, 339 U. S. 382, 401 (1950); see, *e. g.*, *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 462 n. 8 (1952).

A further indicium of "governmental involvement" in the promulgation and enforcement of the challenged broadcaster policy may be seen in the extensive governmental control over the broadcast industry. It is true, of course, that this "Court has never held" that actions of an otherwise private entity necessarily constitute governmental action if that entity "is subject to . . . regulation in any degree whatever." *Moose Lodge No. 107* v. *Irvis*, *supra*, at 173. Here, however, we are confronted, not with some minimal degree of regulation, but, rather, with an elaborate statutory scheme governing virtually all aspects of the broadcast industry.[8] Indeed, federal

[8] Thus, the Communications Act of 1934 authorizes the Federal Communications Commission to assign frequency bands, 47 U. S. C. § 303 (c); allocate licenses by location, § 303 (d); regulate apparatus, § 303 (e); establish service areas, § 303 (h); regulate chain ownership, § 303 (i); require the keeping of detailed records, § 303 (j); establish qualifications of licensees, § 303 (l); suspend licenses, § 303 (m)(1); inspect station facilities, § 303 (n); require publication of call letters and other information, § 303 (p); make rules to effect regulation of radio and television, § 303 (r); require that television sets be capable of receiving all signals, § 303 (s); regulate

agency review and guidance of broadcaster conduct is automatic, continuing, and pervasive.[9] Thus, as the Court of Appeals noted, "[a]lmost no other private business—almost no other regulated private business—is so intimately bound to government . . . ." 146 U. S. App. D. C., at 191, 450 F. 2d, at 652.

Even more important than this general regulatory scheme, however, is the *specific* governmental involvement in the broadcaster policy presently under consideration. There is, for example, an obvious nexus between the Commission's Fairness Doctrine and the absolute refusal of broadcast licensees to sell any part of their air time to groups or individuals wishing to speak out on controversial issues of public importance. Indeed, in defense of this policy, the broadcaster-petitioners argue vigorously that this exclusionary policy is authorized and even compelled by the Fairness Doctrine. And the Court itself recognizes repeatedly that the Fairness Doctrine and other Communications Act policies are

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the granting of licenses and the terms thereof, §§ 307, 309; prescribe information to be supplied by applicants for licenses, § 308 (b); regulate the transfer of licenses, § 310; impose sanctions on licensees, including revocation of license, § 312; require fair coverage of controversial issues, § 315; control the operation of transmitting apparatus, § 318; and prohibit the use of offensive language, 18 U. S. C. § 1464.

[9] Pursuant to statutory authority, see n. 8, *supra*, the Commission has promulgated myriad regulations governing all aspects of licensee conduct. See 47 CFR § 73.17 *et seq.* These regulations affect such matters as hours of operation, § 73.23; multiple ownership of licenses by a single individual, § 73.35; station location and program origination, § 73.30; maintenance of detailed logs of programming, operation, and maintenance, §§ 73.111–116; billing practices, § 73.124; the personal attack and political editorial fairness requirements, § 73.123; relationship of licensees to networks, §§ 73.131–139; permissible equipment, §§ 73.39–50. The above-cited regulations relate only to AM radio, but similar regulations exist for FM radio, § 73.201 *et seq.*, and television, § 73.601 *et seq.*

inextricably linked to the challenged ban. Thus, at one point, the Court suggests that "[i]f the Fairness Doctrine were applied to editorial advertising, there is . . . the substantial danger that the effective operation of that doctrine would be jeopardized." *Ante*, at 124. Similarly, the Court maintains that, in light of the Fairness Doctrine, there simply is no reason to allow individuals to purchase advertising time for the expression of their own views on public issues. See *ante*, at 130–131.[10] Although I do not in any sense agree with the substance of these propositions, they serve at least to illustrate the extent to which the Commission's Fairness Doctrine has influenced the development of the policy here under review.

Moreover, the Commission's involvement in the challenged policy is not limited solely to the indirect effects of its Fairness Doctrine. On the contrary, in a decision which must inevitably provide guidance for future broadcaster action, the Commission has specifically considered and specifically authorized the flat ban. See *Business Executives Move for Vietnam Peace*, 25 F. C. C. 2d 242 (1970); *Democratic National Committee*, 25 F. C. C. 2d 216 (1970). In so doing, the Commission—and through it the Federal Government—has unequivocally given its imprimatur to the absolute ban on editorial advertising. And, of course, it is now well settled that specific governmental approval of or acquiescence in challenged action by a private entity indicates "governmental action."

Thus, in *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151 (1914), for example, the Court dealt with a statute which, as construed by the Court, simply

[10] In addition, the Court contends that, because of the Fairness Doctrine, the challenged broadcaster policy does not discriminate against controversial speech. See *ante*, at 128–130.

authorized rail carriers to provide certain types of cars for white passengers without offering equal facilities to blacks. Although dismissal of the complaint on procedural grounds was affirmed, we made clear that such a statute, even though purely permissive in nature, was invalid under the Fourteenth Amendment because a carrier refusing equal service to blacks would be "acting in the matter under the authority of a state law." *Id.*, at 162. And, some 50 years later, we explained this finding of "governmental action" in *McCabe* as "nothing less than considering a permissive state statute as an authorization to discriminate and as sufficient state action to violate the Fourteenth Amendment. . . ." *Reitman* v. *Mulkey*, 387 U. S., at 379. Thus, "[o]ur prior decisions leave no doubt" that any action of the Government, through any of its agencies, approving, authorizing, encouraging, or otherwise supporting conduct which, if performed by the Government, would violate the Constitution, "constitutes illegal [governmental] involvement in those pertinent private acts . . . that subsequently occur." *Adickes* v. *Kress & Co.*, 398 U. S. 144, 202 (1970) (opinion of BRENNAN, J.); see, *e. g.*, *Moose Lodge No. 107* v. *Irvis*, *supra*; *Hunter* v. *Erickson*, 393 U. S. 385 (1969); *Reitman* v. *Mulkey*, *supra*; *Evans* v. *Newton*, 382 U. S. 296 (1966); *Robinson* v. *Florida*, 378 U. S. 153 (1964); *Lombard* v. *Louisiana*, 373 U. S. 267 (1963); *Peterson* v. *City of Greenville*, 373 U. S. 244 (1963); *Burton* v. *Wilmington Parking Authority*, *supra*; *McCabe* v. *Atchison, T. & S. F. R. Co.*, *supra*.

Finally, and perhaps most important, in a case virtually identical to those now before us, we held that a policy promulgated by a privately owned bus company, franchised by the Federal Government and regulated by the Public Utilities Commission of the District of Columbia, must be subjected to the constraints of the First Amendment. *Public Utilities Comm'n* v. *Pollak*, 343

U. S. 451 (1952). In reaching that result, we placed primary emphasis on the specific regulatory acquiescence in the challenged action of the bus company. Thus, after noting that the bus company "operates its service under the regulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress," we explained that our finding of "governmental action" was predicated specifically

> "upon the fact that that agency, pursuant to protests against the [challenged policy], ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort and convenience were not impaired thereby." *Id.*, at 462.

See *Moose Lodge No. 107* v. *Irvis, supra,* at 175–176, n. 3.

Although THE CHIEF JUSTICE, joined by MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST, strains valiantly to distinguish *Pollak,* he offers nothing more than the proverbial "distinctions without a difference." Here, as in *Pollak,* the broadcast licensees operate "under the regulatory supervision of . . . an agency authorized by Congress." 343 U. S., at 462. And, again as in *Pollak,* that agency received "protests" against the challenged policy and, after formal consideration, "dismissed" the complaints on the ground that the "public interest, convenience, and necessity" were not "impaired" by that policy. Indeed, the argument for finding "governmental action" here is even stronger than in *Pollak,* for this case concerns, not an incidental activity of a bus company, but, rather, the primary activity of the regulated entities—communication.

Thus, given the confluence of these various indicia of "governmental action"—including the public nature

of the airwaves,[11] the governmentally created preferred status of broadcasters, the extensive Government regulation of broadcast programming, and the specific governmental approval of the challenged policy—I can only conclude that the Government "has so far insinuated itself into a position" of participation in this policy that the absolute refusal of broadcast licensees to sell air time to groups or individuals wishing to speak out on controversial issues of public importance must be subjected to the restraints of the First Amendment.[12]

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[11] Moreover, the appropriateness of a particular forum, even if privately owned, for effective communication has in some instances been emphasized to establish the relevance of First Amendment protections. See, *e. g.*, *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U. S. 308 (1968); *Marsh* v. *Alabama*, 326 U. S. 501 (1946). Here, as the Court of Appeals recognized, "the broadcast media are specifically dedicated to communication. They function as both our foremost forum for public speech and our most important educator of an informed people." 146 U. S. App. D. C. 181, 192, 450 F. 2d 642, 653. See also text and notes, at nn. 35–37, *infra*.

[12] In his concurring opinion, my Brother STEWART suggests that a finding of governmental action in this context necessarily means that "private broadcasters *are* Government." *Ante*, at 139 (emphasis in original). In my view, this assertion reflects a complete misunderstanding of the nature of the governmental involvement in these cases. Here, the Government has selected the persons who will be permitted to operate a broadcast station, extensively regulates those broadcasters, and has specifically approved the challenged broadcaster policy. Thus, the commands of the First Amendment come into play, not because "private broadcasters *are* Government," but, rather, because the Government "has so far insinuated itself into a position" of participation in the challenged policy as to make the Government itself responsible for its effects. Similarly, I cannot agree with my Brother STEWART's suggestion that a finding of governmental involvement here "would . . . simply strip broadcasters of their own First Amendment rights." *Ibid.* The actions of a purely private individual are, of course, not subject to the constraints of the First Amendment. But where, as here, the

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Radio and television have long been recognized as forms of communication "affected by a First Amendment interest" and, indeed, it can hardly be doubted that broadcast licensees are themselves protected by that Amendment. *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S., at 386. See *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166 (1948); Z. Chafee, Free Speech in the United States 545–546 (1941). Recognition of this fact does not end our inquiry, however, for it is equally clear that the protection of the First Amendment in this context is not limited solely to broadcasters. On the contrary, at least one set of competing claims to the

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Government has implicated itself in the actions of an otherwise private individual, that individual must exercise his own rights with due regard for the First Amendment rights of others. In other words, an accommodation of competing rights is required, and "balancing," not the "absolutist" approach suggested by my Brother STEWART, is the result. Indeed, it is this misunderstanding of the significance of governmental involvement that apparently leads to my Brother STEWART's disagreement with my Brothers WHITE, BLACKMUN, and POWELL as to the relationship between the "public interest" standard of the Act and First Amendment "values."

I might also note that, contrary to the suggestion of my Brother STEWART, a finding of governmental involvement in this case does not in any sense command a similar conclusion with respect to newspapers. Indeed, the factors that compel the conclusion that the Government is involved in the promulgation and enforcement of the challenged broadcaster policy have simply no relevance to newspapers. The decision as to who shall operate newspapers is made in the free market, not by Government fiat. The newspaper industry is not extensively regulated and, indeed, in light of the differences between the electronic and printed media, such regulation would violate the First Amendment with respect to newspapers. Finally, since such regulation of newspapers would be impossible, it would likewise be impossible for the Government to approve an exclusionary policy of newspapers in the sense that it has approved the challenged policy of the broadcasters.

protection of that Amendment derives from the fact that, because of the limited number of broadcast frequencies available and the potentially pervasive impact of the electronic media, "the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment." *Red Lion Broadcasting Co.* v. *FCC, supra,* at 390.

Over 50 years ago, Mr. Justice Holmes sounded what has since become a dominant theme in applying the First Amendment to the changing problems of our Nation. "[T]he ultimate good," he declared, "is better reached by free trade in ideas," and "the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." *Abrams* v. *United States,* 250 U. S. 616, 630 (1919) (dissenting opinion); see also *Whitney* v. *California,* 274 U. S. 357, 375–376 (1927) (Brandeis, J., concurring); *Gitlow* v. *New York,* 268 U. S. 652, 672–673 (1925) (Holmes, J., dissenting). Indeed, the First Amendment itself testifies to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," [13] and the Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ." *Associated Press* v. *United States,* 326 U. S. 1, 20 (1945). For "it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected." *Terminiello* v. *Chicago,* 337 U. S. 1, 4 (1949); see also *Thornhill* v. *Alabama,* 310 U. S. 88, 102 (1940); *Palko* v. *Connecticut,* 302 U. S. 319, 326–327 (1937).

[13] *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270 (1964); see also *Pickering* v. *Board of Education,* 391 U. S. 563, 573 (1968); *Mills* v. *Alabama,* 384 U. S. 214, 218 (1966).

With considerations such as these in mind, we have specifically declared that, in the context of radio and television broadcasting, the First Amendment protects "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences . . . ." *Red Lion Broadcasting Co.* v. *FCC*, *supra*, at 390.[14] And, because "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee," "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Ibid.*

Thus, we have explicitly recognized that, in light of the unique nature of the electronic media, the public have strong First Amendment interests in the reception of a full spectrum of views—presented in a vigorous and uninhibited manner—on controversial issues of public importance. And, as we have seen, it has traditionally been thought that the most effective way to insure this "uninhibited, robust, and wide-open" debate is by fostering a "free trade in ideas" by making our forums of communication readily available to all persons wishing to express their views. Although apparently conceding the legitimacy of these principles, the Court nevertheless upholds the absolute ban on editorial advertising because, in its view, the Commission's Fairness Doctrine, in and of itself, is sufficient to satisfy the First Amendment interests of the public. I cannot agree.

[14] This was not new doctrine, for we have long recognized in a variety of contexts that the First Amendment "necessarily protects the right to receive [information]." *Martin* v. *City of Struthers*, 319 U. S. 141, 143 (1943); see, *e. g.*, *Stanley* v. *Georgia*, 394 U. S. 557, 564 (1969); *Time, Inc.* v. *Hill*, 385 U. S. 374, 388 (1967); *Griswold* v. *Connecticut*, 381 U. S. 479, 482 (1965); *Lamont* v. *Postmaster General*, 381 U. S. 301 (1965).

The Fairness Doctrine originated early in the history of broadcast regulation and, rather than being set forth in any specific statutory provision,[15] developed gradually in a long series of Commission rulings in particular cases.[16] In essence, the doctrine imposes a twofold duty upon broadcast licensees: (1) coverage of issues of public importance must be adequate,[17] and (2) such coverage must fairly reflect opposing viewpoints.[18] See *Red Lion Broadcasting Co.* v. *FCC*, *supra*, at 377. In fulfilling their obligations under the Fairness Doctrine,

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[15] The Fairness Doctrine was recognized and implicitly approved by Congress in the 1959 amendments to § 315 of the Communications Act. Act of Sept. 14, 1959, § 1, 73 Stat. 557, 47 U. S. C. § 315 (a). As amended, § 315 (a) recognizes the obligation of broadcasters "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

[16] The Fairness Doctrine was first fully set forth in Report in the Matter of Editorializing by Broadcast Licensees, 13 F. C. C. 1246 (1949), and was elaborated upon in Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964). The statutory authority of the Commission to promulgate this doctrine and related regulations derives from the mandate to the "Commission from time to time, as public convenience, interest, or necessity requires," to promulgate "such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of [the Act]. . . ." 47 U. S. C. § 303 (r).

[17] See *John J. Dempsey*, 6 P & F Radio Reg. 615 (1950); see also *Metropolitan Broadcasting Corp.*, 19 P & F Radio Reg. 602 (1960); *The Evening News Assn.*, 6 P & F Radio Reg. 283 (1950).

[18] If the broadcaster presents one side of a question, and does not wish to present the other side himself, he can fulfill his fairness obligation by announcing his willingness to broadcast opposing views by volunteers. See *Mid-Florida Television Corp.*, 40 F. C. C. 620 (1964). If the broadcaster rejects a volunteer spokesman as "inappropriate," he must seek out others. See *Richard G. Ruff*, 19 F. C. C. 2d 838 (1969). The broadcaster must provide free time for the presentation of opposing views if sponsorship is unavailable. See *Cullman Broadcasting Co.*, 25 P & F Radio Reg. 895 (1963).

however, broadcast licensees have virtually complete discretion, subject only to the Commission's general requirement that licensees act "reasonably and in good faith," [19] "to determine what issues should be covered, how much time should be allocated, which spokesmen should appear, and in what format." [20] Thus, the Fairness Doctrine does not in any sense require broadcasters to allow "non-broadcaster" speakers to use the airwaves to express their own views on controversial issues of public importance.[21] On the contrary, broadcasters may meet

[19] Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, *supra*, n. 16, at 10424.

[20] Notice of Inquiry: The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 30 F. C. C. 2d 26, 27–28 (1971); see also Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, *supra*, n. 16, at 10416; Report in the Matter of Editorializing by Broadcast Licensees, *supra*, n. 16.

[21] Thus, the Fairness Doctrine must be sharply distinguished from the "equal time" requirement, which provides that a broadcaster who affords air time to one political candidate must make equal time available to other candidates for the same office. 47 U. S. C. § 315. See also *Nicholas Zapple*, 23 F. C. C. 2d 707 (1970) (extension of "equal time" rule to cover a candidate's supporters where spokesmen for other candidates are permitted to purchase air time). Similarly, the Fairness Doctrine must not be confused with the Commission's "personal attack" and "political editorializing" rules which were upheld in *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969). The "personal attack" rule provides that "[w]hen, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person," the licensee must notify the person attacked and offer him an opportunity to respond. 47 CFR § 73.123. The "political editorializing" rule provides that when a licensee endorses a candidate for political office it must give other candidates or their spokesmen an opportunity to respond. See, *e. g.*, 47 CFR § 73.123. Thus, unlike the Fairness Doctrine, the "equal time," "personal attack," and "political editorializing" rules grant a particular group or individual a limited "right of access" to the airwaves not subject to the "journalistic supervision" of the broadcaster.

their fairness responsibilities through presentation of carefully edited news programs, panel discussions, interviews, and documentaries. As a result, broadcasters retain almost exclusive control over the selection of issues and viewpoints to be covered, the manner of presentation, and, perhaps most important, who shall speak. Given this doctrinal framework, I can only conclude that the Fairness Doctrine, standing alone, is insufficient—in theory as well as in practice—to provide the kind of "uninhibited, robust, and wide-open" exchange of views to which the public is constitutionally entitled.

As a practical matter, the Court's reliance on the Fairness Doctrine as an "adequate" alternative to editorial advertising seriously overestimates the ability—or willingness—of broadcasters to expose the public to the "widest possible dissemination of information from diverse and antagonistic sources." [22] As Professor Jaffe has noted, "there is considerable possibility the broadcaster will exercise a large amount of self-censorship and try to avoid as much controversy as he safely can." [23] Indeed, in light of the strong interest of broadcasters in maximizing their audience, and therefore their profits, it seems almost naive to expect the majority of broadcasters to produce the variety and controversiality of material necessary to reflect a full spectrum of viewpoints. Stated simply, angry customers are not good customers and, in the commercial world of mass communications, it is simply "bad business" to espouse—or even to allow others to espouse—the heterodox or the controversial. As a result, even under the Fairness Doctrine, broadcasters generally tend to permit only estab-

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[22] *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945).

[23] Jaffe, The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access, 85 Harv. L. Rev. 768, 773 n. 26 (1972).

lished—or at least moderated—views to enter the broadcast world's "marketplace of ideas." [24]

Moreover, the Court's reliance on the Fairness Doctrine as the *sole* means of informing the public seriously misconceives and underestimates the public's

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[24] See generally D. Lacy, Freedom and Communications 69 (1961); Mallamud, The Broadcast Licensee as Fiduciary: Toward the Enforcement of Discretion, 1973 Duke L. J. 89, 94–95, 98–99; Jaffe, *supra*, n. 23, at 773 n. 26; Canby, The First Amendment Right to Persuade: Access to Radio and Television, 19 U. C. L. A. L. Rev. 723, 727 (1972); Malone, Broadcasting, The Reluctant Dragon: Will the First Amendment Right of Access End the Suppressing of Controversial Ideas?, 5 U. Mich. J. L. Reform 193, 205–211, 216 (1972); Johnson & Westen, A Twentieth Century Soapbox: The Right to Purchase Radio and Television Time, 57 Va. L. Rev. 574 (1971); Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967); Note, Free Speech and the Mass Media, 57 Va. L. Rev. 636 (1971); Note, A Fair Break for Controversial Speakers: Limitations of the Fairness Doctrine and the Need for Individual Access, 39 Geo. Wash. L. Rev. 532 (1971); Note, The Wasteland Revisited: A Modest Attack Upon the FCC's Category System, 17 U. C. L. A. L. Rev. 868, 870–875 (1970); Comment, Freedom of Speech and the Individual's Right of Access to the Airwaves, 1970 Law & Social Order 424, 428; Note, The Federal Communications Commission's Fairness Regulations: A First Step Towards Creation of a Right of Access to the Mass Media, 54 Cornell L. Rev. 294, 296 (1969).

Although admitting that the Fairness Doctrine "has not always brought to the public perfect or, indeed, even consistently high-quality treatment of all public events and issues," the Court nevertheless suggests that a broadcaster who fails to fulfill his fairness obligations does so "at the risk of losing his license." *Ante*, at 130–131. The Court does not cite a single instance, however, in which this sanction has ever been invoked because of a broadcaster's failure to comply with the Fairness Doctrine. Indeed, this is not surprising, for the Commission has acted with great reluctance in this area, intervening in only the most extreme cases of broadcaster abuse. See Mallamud, *supra*, at 115–122; Canby, *supra*, at 725–727; Malone, *supra*, at 215–216; see also Cox & Johnson, Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study, 14 F. C. C. 2d 1 (1968).

interest in receiving ideas and information directly from the advocates of those ideas without the interposition of journalistic middlemen. Under the Fairness Doctrine, broadcasters decide what issues are "important," how "fully" to cover them, and what format, time, and style of coverage are "appropriate." The retention of such *absolute* control in the hands of a few Government licensees is inimical to the First Amendment, for vigorous, free debate can be attained only when members of the public have at least *some* opportunity to take the initiative and editorial control into their own hands.

Our legal system reflects a belief that truth is best illuminated by a collision of genuine advocates. Under the Fairness Doctrine, however, accompanied by an absolute ban on editorial advertising, the public is compelled to rely *exclusively* on the "journalistic discretion" of broadcasters, who serve in theory as surrogate spokesmen for all sides of all issues. This separation of the advocate from the expression of his views can serve only to diminish the effectiveness of that expression. Indeed, we emphasized this fact in *Red Lion:* [25]

> "Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them."

Thus, if the public is to be honestly and forthrightly apprised of opposing views on controversial issues, it is imperative that citizens be permitted at least *some*

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[25] *Red Lion Broadcasting Co.* v. *FCC, supra,* at 392 n. 18, quoting J. Mill, On Liberty 32 (R. McCallum ed. 1947).

opportunity to speak directly for themselves as genuine advocates on issues that concern them.

Moreover, to the extent that broadcasters actually permit citizens to appear on "their" airwaves under the Fairness Doctrine, such appearances are subject to extensive editorial control. Yet it is clear that the effectiveness of an individual's expression of his views is as dependent on the style and format of presentation as it is on the content itself. And the relegation of an individual's views to such tightly controlled formats as the news, documentaries, edited interviews, or panel discussions may tend to minimize, rather than maximize the effectiveness of speech. Under a limited scheme of editorial advertising, however, the crucial editorial controls are in the speaker's own hands.

Nor are these cases concerned solely with the adequacy of coverage of those views and issues which generally are recognized as "newsworthy." For also at stake is the right of the public to receive suitable access to new and generally unperceived ideas and opinions. Under the Fairness Doctrine, the broadcaster is required to present only *"representative* community views and voices on controversial issues" of public importance.[26] Thus, by definition, the Fairness Doctrine tends to perpetuate coverage of those "views and voices" that are already established, while failing to provide for exposure of the public to those "views and voices" that are novel, unorthodox, or unrepresentative of prevailing opinion.[27]

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[26] *Democratic National Committee*, 25 F. C. C. 2d, at 222 (emphasis added).

[27] Indeed, the failure to provide adequate means for groups and individuals to bring new issues or ideas to the attention of the public explains, at least to some extent, "the development of new media to convey unorthodox, unpopular, and new ideas. Sit-ins and demonstrations testify to . . . the inability to secure access to the conventional means of reaching and changing public opinion. [For by]

Finally, it should be noted that the Fairness Doctrine permits, indeed *requires,* broadcasters to determine for themselves which views and issues are sufficiently "important" to warrant discussion. The briefs of the broadcaster-petitioners in this case illustrate the type of "journalistic discretion" licensees now exercise in this regard. Thus, ABC suggests that it would refuse to air those views which *it* considers "scandalous" or "crackpot," [28] while CBS would exclude those issues or opinions that are "insignificant" [29] or "trivial." [30] Similarly, NBC would bar speech that strays "beyond the bounds of normally accepted taste," [31] and WTOP would protect the public from subjects that are "slight, parochial or inappropriate." [32]

The genius of the First Amendment, however, is that it has always defined what the public ought to hear by permitting speakers to say what they wish. As the Court of Appeals recognized, "[i]t has traditionally been thought that the best judge of the importance of a particular viewpoint or issue is the individual or group holding the viewpoint and wishing to communicate it to others." 146 U. S. App. D. C., at 195, 450 F. 2d, at 656. Indeed, "supervised and ordained discussion" is directly contrary to the underlying purposes of the First Amendment,[33] for that Amendment "presupposes that right

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the bizarre and unsettling nature of his technique, the demonstrator hopes to arrest and divert attention long enough to compel the public to ponder his message." Barron, 80 Harv. L. Rev., at 1647; cf. *Adderley* v. *Florida,* 385 U. S. 39, 50–51 (1966) (DOUGLAS, J., dissenting).

[28] Brief for American Broadcasting Companies, Inc. 52.

[29] Brief for Columbia Broadcasting System, Inc. 34.

[30] *Id.,* at 40.

[31] Brief for National Broadcasting Company, Inc. 10.

[32] Brief for Post-Newsweek Stations, Capital Area, Inc. 31.

[33] *Tinker* v. *Des Moines Independent School District,* 393 U. S. 503, 512 (1969).

conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." [34] Thus, in a related context, we have explicitly recognized that editorial advertisements constitute "an important outlet for the promulgation of information and ideas by persons who do not themselves have access to [media] facilities," and the unavailability of such editorial advertising can serve only "to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.' " *New York Times Co.* v. *Sullivan*, 376 U. S., at 266.

The Fairness Doctrine's requirement of full and fair coverage of controversial issues is, beyond doubt, a commendable and, indeed, essential tool for effective regulation of the broadcast industry. But, standing alone, it simply cannot eliminate the need for a further, complementary airing of controversial views through the limited availability of editorial advertising. Indeed, the availability of at least *some* opportunity for editorial advertising is imperative if we are ever to attain the " 'free and general discussion of public matters [that] seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.' " *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250 (1936).

III

Moreover, a proper balancing of the competing First Amendment interests at stake in this controversy must consider, not only the interests of broadcasters and of the listening and viewing public, but also the independent First Amendment interest of groups and individuals in effective self-expression. See, *e. g.*, T. Emerson, Toward

[34] *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (SDNY 1943), aff'd, 326 U. S. 1 (1945). See also *Thomas* v. *Collins*, 323 U. S. 516, 545 (1945) (Jackson, J., concurring).

a General Theory of the First Amendment 4–7 (1966); Z. Chafee, Free Speech in the United States 33 (1941). "[S]peech concerning public affairs . . . is the essence of self-government," *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964), and the First Amendment must therefore safeguard not only the right of the public to *hear* debate, but also the right of individuals to *participate* in that debate and to attempt to persuade others to their points of view. See, *e. g.*, *Thomas* v. *Collins*, 323 U. S. 516, 537 (1945); cf. *NAACP* v. *Button*, 371 U. S. 415, 429–430 (1963). And, in a time of apparently growing anonymity of the individual in our society, it is imperative that we take special care to preserve the vital First Amendment interest in assuring "self-fulfillment [of expression] for each individual." *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972). For our citizens may now find greater than ever the need to express their own views directly to the public, rather than through a governmentally appointed surrogate, if they are to feel that they can achieve at least some measure of control over their own destinies.

In light of these considerations, the Court would concede, I assume, that our citizens have at least an abstract right to express their views on controversial issues of public importance. But freedom of speech does not exist in the abstract. On the contrary, the right to speak can flourish only if it is allowed to operate in an effective forum—whether it be a public park, a schoolroom, a town meeting hall, a soapbox, or a radio and television frequency. For in the absence of an effective means of communication, the right to speak would ring hollow indeed. And, in recognition of these principles, we have consistently held that the First Amendment embodies, not only the abstract right to be free from censorship, but also the right of an individual to utilize an appropriate and effective medium for the expression of his views.

See, *e. g., Lloyd Corp., Ltd.* v. *Tanner,* 407 U. S. 551, 559 (1972); *Tinker* v. *Des Moines Independent School District,* 393 U. S. 503 (1969); *Amalgamated Food Employees Union* v. *Logan Valley Plaza,* 391 U. S. 308 (1968); *Brown* v. *Louisiana,* 383 U. S. 131 (1966); *Edwards* v. *South Carolina,* 372 U. S. 229 (1963); *Kunz* v. *New York,* 340 U. S. 290 (1951); *Marsh* v. *Alabama,* 326 U. S. 501 (1946); *Jamison* v. *Texas,* 318 U. S. 413 (1943); *Schneider* v. *State,* 308 U. S. 147 (1939); *Hague* v. *CIO,* 307 U. S. 496 (1939).

Here, of course, there can be no doubt that the broadcast frequencies allotted to the various radio and television licensees constitute appropriate "forums" for the discussion of controversial issues of public importance.[35]

[35] The Court does make the rather novel suggestion, however, that editorial advertising might indeed be "inappropriate" because "listeners and viewers constitute a 'captive audience.'" *Ante,* at 127. In support of this proposition, the Court cites our decisions in *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451 (1952), and *Kovacs* v. *Cooper,* 336 U. S. 77 (1949). In *Pollak,* however, we explicitly *rejected* a claim that the broadcasting of radio programs in streetcars violated the First and Fifth Amendment rights of passengers who did not wish to listen to those programs. And in *Kovacs,* although we upheld an ordinance forbidding the use on public streets of sound trucks which emit "loud and raucous noises," we did so because the ordinance was concerned, not with the *content* of speech, but, rather, with the offensiveness of the sounds themselves. Here, however, the Court seems perfectly willing to allow broadcasters to continue to invade the "privacy" of the home through commercial advertising and even controversial programming under the Fairness Doctrine. Thus, the Court draws its line solely on the basis of the content of the particular speech involved and, of course, we have consistently held that, where content is at issue, constitutionally protected speech may not be prohibited because of a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker* v. *Des Moines Independent School District,* 393 U. S., at 509; see, *e. g., Grayned* v. *City of Rockford,* 408 U. S. 104, 117 (1972). The suggestion that constitutionally protected speech may be banned because some per-

Indeed, unlike the streets, parks, public libraries, and other "forums" that we have held to be appropriate for the exercise of First Amendment rights, the broadcast media are dedicated *specifically* to communication. And, since the expression of ideas—whether political, commercial, musical, or otherwise—is the exclusive purpose of the broadcast spectrum, it seems clear that the adoption of a limited scheme of editorial advertising would in no sense divert that spectrum from its intended use. Cf. *Lloyd Corp., Ltd.* v. *Tanner, supra,* at 563; *Amalgamated Food Employees Union* v. *Logan Valley Plaza, supra,* at 320.

Moreover, it is equally clear that, with the assistance of the Federal Government, the broadcast industry has become what is potentially the most efficient and effective "marketplace of ideas" ever devised.[36] Indeed, the electronic media are today "the public's prime source of information," [37] and we have ourselves recognized that broadcast "technology . . . supplants atomized, relatively

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sons may find the ideas expressed offensive is, in itself, offensive to the very meaning of the First Amendment.

[36] Indeed, approximately 95% of American homes contain at least one television set, and that set is turned on for an average of more than five and one-half hours per day. See Hearings on H. R. 13721 before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, 91st Cong., 2d Sess., 7 (1970) (statement of Dean Burch, Chairman of the Federal Communications Commission). As to the potential influence of the electronic media on American thought, see generally A. Krock, The Consent of the Governed 66 (1971); H. Mendelsohn & I. Crespi, Polls, Television, and the New Politics 256, 264 (1970); Malone, 5 U. Mich. J. L. Reform, at 197.

[37] H. R. Rep. No. 91–257, p. 6 (1969). According to one study, 67% of Americans prefer the electronic media to other sources of information. See G. Wyckoff, The Image Candidates 13–14 (1968). See also Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules, 22 F. C. C. 2d 339, 344 (1970) (59% of Americans depend on television as their principal source of news).

informal communication with mass media as a prime source of national cohesion and news . . . ." *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S., at 386 n. 15. Thus, although "full and free discussion" of ideas may have been a reality in the heyday of political pamphleteering, modern technological developments in the field of communications have made the soapbox orator and the leafleteer virtually obsolete. And, in light of the current dominance of the electronic media as the most effective means of reaching the public, any policy that *absolutely* denies citizens access to the airwaves necessarily renders even the concept of "full and free discussion" practically meaningless.

Regrettably, it is precisely such a policy that the Court upholds today. And, since effectuation of the individual's right to speak through a limited scheme of editorial advertising can serve only to further, rather than to inhibit, the public's interest in receiving suitable exposure to "uninhibited, robust, and wide-open" debate on controversial issues, the challenged ban can be upheld only if it is determined that such editorial advertising would unjustifiably impair the broadcaster's assertedly overriding interest in exercising *absolute* control over "his" frequency.[38] Such an analysis, however, hardly reflects the delicate balancing of interests that this sensitive question demands. Indeed, this "absolutist" approach wholly disregards the competing First Amendment rights of all "non-broadcaster" citizens, ignores the

[38] It should be noted that, although the Fairness Doctrine is at least arguably relevant to the *public's* interest in receiving suitable exposure to "uninhibited, robust, and wide-open" debate on controversial issues, it is not in any sense relevant to the *individual's* interest in obtaining access to the airwaves for the purpose of effective self-expression. For the individual's interest in expressing his own views in a manner of his own choosing is an inherently personal one, and it can never be satisfied by the expression of "similar" views by a surrogate spokesman.

teachings of our recent decision in *Red Lion Broadcasting Co.* v. *FCC, supra,* and is not supported by the historical purposes underlying broadcast regulation in this Nation.

Prior to 1927, it must be remembered, it was clearly recognized that the broadcast spectrum was part of the public domain. As a result, the allocation of frequencies was left entirely to the private sector,[39] and groups and individuals therefore had the same right of access to radio facilities as they had, and still have, to the printed press—that is, "anyone who will may transmit." [40] Under this scheme, however, the number of broadcasters increased so dramatically that by 1927 every frequency was occupied by at least one station, and many were occupied by several. "The result was confusion and chaos. With everybody on the air, nobody could be heard." *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 212 (1943). It soon became "apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government." *Red Lion Broadcasting Co.* v. *FCC, supra,* at 376. Thus, in the Radio Act of 1927, 44 Stat. 1162, Congress placed the broadcast spectrum under federal regulation and sought to reconcile competing uses of the airwaves by setting aside a limited number of frequencies for each of the important uses of radio.[41] And, since the number of frequencies allocated to public broadcasting was necessarily limited, the

[39] Indeed, pre-1927 regulation of radio gave no discretion to the Federal Government to deny the right to operate a broadcast station. See 1 A. Socolow, The Law of Radio Broadcasting 38 (1939); H. Warner, Radio & Television Law 757 *et seq.* (1948); see generally *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 210–214 (1943).

[40] 67 Cong. Rec. 5479 (Rep. White).

[41] These include, of course, not only public broadcasting, but also "amateur operation, aircraft, police, defense, and navigation . . . ." *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S., at 388.

Government was compelled to grant licenses to some applicants while denying them to others. See generally *Red Lion Broadcasting Co.* v. *FCC, supra,* at 375–377, 388; *National Broadcasting Co.* v. *United States, supra,* at 210–214.

Although the overriding need to avoid overcrowding of the airwaves clearly justifies the imposition of a ceiling on the number of individuals who will be permitted to operate broadcast stations[42] and, indeed, renders it "idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish,"[43] it does not in any sense dictate that the continuing First Amendment rights of all nonlicensees be brushed aside entirely. Under the existing system, broadcast licensees are granted a preferred status with respect to the airwaves, not because they have competed successfully in the free market but, rather, "because of their initial government selection . . . ." *Red Lion Broadcasting Co.* v. *FCC, supra,* at 400. And, in return for that "preferred status," licensees must respect the competing First Amendment

[42] Although this licensing scheme necessarily restricts the First Amendment rights of those groups or individuals who are denied the "right" to operate a broadcast station, it does not, in and of itself, violate the First Amendment. For it has long been recognized that when "[c]onflicting demands on the same [forum] . . . compel the [Government] to make choices among potential users and uses," neutral rules of allocation to govern that scarce communications resource are not *per se* unconstitutional. *Police Dept. of Chicago* v. *Mosley,* 408 U. S. 92, 98 (1972); cf. *Cox* v. *Louisiana,* 379 U. S. 536, 554 (1965); *Cox* v. *New Hampshire,* 312 U. S. 569, 574 (1941); *Schneider* v. *State,* 308 U. S. 147, 160 (1939). And, in the context of broadcasting, it would be ironic indeed "if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible . . . by limiting the number of licenses so as not to overcrowd the spectrum." *Red Lion Broadcasting Co.* v. *FCC, supra,* at 389.

[43] *Id.,* at 388.

rights of others. Thus, although the broadcaster has a clear First Amendment right to be free from Government censorship in the expression of his own views [44] and, indeed, has a significant interest in exercising reasonable journalistic control over the use of his facilities, "[*t*]*he right of free speech of a broadcaster . . . does not embrace a right to snuff out the free speech of others.*" *Id.*, at 387 (emphasis added). Indeed, after careful consideration of the nature of broadcast regulation in this country, we have specifically declared that

> "as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to . . . monopolize a radio frequency to the exclusion of his fellow citizens." *Id.*, at 389.

Because I believe this view is as sound today as when voiced only four years ago, I can only conclude that there is simply no overriding First Amendment interest of broadcasters that can justify the *absolute* exclusion of virtually all of our citizens from the most effective "marketplace of ideas" ever devised.

This is not to say, of course, that broadcasters have *no* First Amendment interest in exercising journalistic supervision over the use of their facilities. On the contrary, such an interest does indeed exist, and it is an interest that must be weighed heavily in any legitimate effort to balance the competing First Amendment interests involved in this case. In striking such a balance, however, it must be emphasized that these cases deal *only* with the allocation of *advertising* time—air time that broadcasters regularly relinquish to others without the retention of significant editorial control. Thus, we are concerned here, not with the speech of broadcasters them-

[44] See, *e. g.*, 47 U. S. C. § 326.

selves,[45] but, rather, with their "right" to decide which *other* individuals will be given an opportunity to speak in a forum that has already been opened to the public.

Viewed in this context, the *absolute* ban on editorial advertising seems particularly offensive because, although broadcasters refuse to sell any air time whatever to groups or individuals wishing to speak out on controversial issues of public importance, they make such air time readily available to those "commercial" advertisers who seek to peddle their goods and services to the public. Thus, as the system now operates, any person wishing to market a particular brand of beer, soap, toothpaste, or deodorant has direct, personal, and instantaneous access to the electronic media. He can present his own message, in his own words, in any format he selects, and at a time of his own choosing. Yet a similar individual seeking to discuss war, peace, pollution, or the suffering of the poor is denied this right to speak. Instead, he is compelled to rely on the beneficence of a corporate "trustee" appointed by the Government to argue his case for him.

It has long been recognized, however, that although access to public forums may be subjected to reasonable "time, place, and manner" regulations,[46] "[s]elective exclusions from a public forum may not be based on *content* alone . . . ." *Police Dept. of Chicago* v. *Mosley*, 408 U. S., at 96 (emphasis added); see, *e. g.*, *Shuttlesworth* v. *City of Birmingham*, 394 U. S. 147 (1969);

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[45] Thus, as the Court of Appeals recognized, "[i]n normal programming time, closely controlled and edited by broadcasters, the constellation of constitutional interests would be substantially different." 146 U. S. App. D. C., at 193, 450 F. 2d, at 654.

[46] See, *e. g.*, *Police Dept. of Chicago* v. *Mosley*, *supra*, at 98; *Grayned* v. *City of Rockford*, 408 U. S., at 115; *Cox* v. *Louisiana*, *supra*, at 554; *Poulos* v. *New Hampshire*, 345 U. S. 395, 398 (1953); *Cox* v. *New Hampshire*, *supra*, at 575–576; *Schneider* v. *State*, *supra*, at 160.

Edwards v. *South Carolina*, 372 U. S. 229 (1963); *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951); *Saia* v. *New York*, 334 U. S. 558 (1948). Here, of course, the differential treatment accorded "commercial" and "controversial" speech clearly violates that principle.[47] Moreover, and not without some irony, the favored treatment given "commercial" speech under the existing scheme clearly reverses traditional First Amendment priorities. For it has generally been understood that "commercial" speech enjoys *less* First Amendment protection than speech directed at the discussion of controversial issues of public importance. See, *e. g.*, *Breard* v. *Alexandria*, 341 U. S. 622 (1951); *Valentine* v. *Chrestensen*, 316 U. S. 52 (1942).

The First Amendment values of individual self-fulfillment through expression and individual participation in public debate are central to our concept of liberty. If these values are to survive in the age of technology, it is essential that individuals be permitted at least *some* opportunity to express their views on public issues over the electronic media. Balancing those interests against the limited interest of broadcasters in exercising "journalistic supervision" over the mere allocation of *advertising* time that is already made available to some members of the public, I simply cannot conclude that the interest of broadcasters must prevail.

IV

Finally, the Court raises the specter of administrative apocalypse as justification for its decision today. The Court's fears derive largely from the assumption, implicit

[47] Contrary to the Court's assertion, the existence of the Fairness Doctrine cannot in any sense rationalize this discrimination. Indeed, the Fairness Doctrine is wholly unresponsive to the need for individual access to the airwaves for the purpose of effective self-expression. See also n. 38, *supra*.

in its analysis, that the Court of Appeals mandated an *absolute* right of access to the airwaves In reality, however, the issue in these cases is not whether there is an *absolute* right of access but, rather, whether there may be an *absolute denial* of such access. The difference is, of course, crucial, and the Court's misconception of the issue seriously distorts its evaluation of the administrative difficulties that an invalidation of the absolute ban might conceivably entail.

Specifically, the Court hypothesizes three potential sources of difficulty: (1) the availability of editorial advertising might, in the absence of adjustments in the system, tend to favor the wealthy; (2) application of the Fairness Doctrine to editorial advertising might adversely affect the operation of that doctrine; and (3) regulation of editorial advertising might lead to an enlargement of Government control over the content of broadcast discussion. These are, of course, legitimate and, indeed, important concerns. But, at the present time, they are concerns—not realities. We simply have no sure way of knowing whether, and to what extent, if any, these potential difficulties will actually materialize. The Court's bare assumption that these hypothetical problems are both inevitable and insurmountable indicates an utter lack of confidence in the ability of the Commission and licensees to adjust to the changing conditions of a dynamic medium. This sudden lack of confidence is, of course, strikingly inconsistent with the general propositions underlying all other aspects of the Court's approach to this case.

Moreover, it is noteworthy that, 28 years ago, the Commission itself declared that

> "the operation of any station under the extreme principles that no time shall be sold for the dis-

> cussion of controversial public issues . . . is inconsistent with the concept of public interest. . . . The Commission recognizes that good program balance may not permit the sale or donation of time to all who may seek it for such purposes and that difficult problems calling for careful judgment on the part of station management may be involved in deciding among applicants for time when all cannot be accommodated. However, competent management should be able to meet such problems in the public interest and with fairness to all concerned. The fact that it places an arduous task on management should not be made a reason for evading the issue by a strict rule against the sale of time for any programs of the type mentioned." *United Broadcasting Co.*, 10 F. C. C. 515, 518 (1945).

I can see no reason why the Commission and licensees should be deemed any less competent today then they were in 1945. And even if intervening developments have increased the complexities involved in implementing a limited right of access, there is certainly no dearth of proposed solutions to the potential difficulties feared by the Court. See, *e. g.*, Canby, The First Amendment Right to Persuade: Access to Radio and Television, 19 U. C. L. A. L. Rev. 723, 754–757 (1972); Malone, Broadcasting, the Reluctant Dragon: Will the First Amendment Right of Access End the Suppressing of Controversial Ideas?, 5 U. Mich. J. L. Reform 193, 252–269 (1972); Johnson & Westen, A Twentieth-Century Soapbox: The Right to Purchase Radio and Television Time, 57 Va. L. Rev. 574 (1971); Note, 85 Harv. L. Rev. 689, 693–699 (1972).

With these considerations in mind, the Court of Appeals confined itself to invalidating the flat ban alone,

leaving broad latitude [48] to the Commission and licensees to develop in the first instance reasonable regulations to govern the availability of editorial advertising. In the context of these cases, this was surely the wisest course to follow, for "if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing [First Amendment values], there will be time enough to reconsider the constitutional implications." *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S., at 393.

For the present, however, and until such time, if ever, as these assertedly "overriding" administrative difficulties actually materialize, I must agree with the conclusion of the Court of Appeals that although "it may unsettle some of us to see an antiwar message or a political party message in the accustomed place of a soap or beer commercial . . . we must not equate what is habitual with what is right—or what is constitutional. A society already so saturated with commercialism can well afford another outlet for speech on public issues. All that we may lose is some of our apathy." [49]

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[48] The Court of Appeals did, however, suggest certain possible contours of implementation. For example, the court noted that broadcasters should be permitted "to place an outside limit on the total amount of editorial advertising they will sell," and "'reasonable regulation' of the placement of advertisements is altogether proper." 146 U. S. App. D. C., at 202, 450 F. 2d, at 663.

[49] *Id.*, at 204–205, 450 F. 2d, at 665–666.

KEEBLE *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 72-5323. Argued March 27, 1973—Decided May 29, 1973

Petitioner, an Indian, was convicted of assault with intent to commit serious bodily injury on an Indian reservation, a federal crime under the Major Crimes Act of 1885, after the court refused to instruct the jury on the lesser included offense of simple assault. The Court of Appeals affirmed on the ground that since simple assault is not one of the offenses enumerated in the Act, it would be exclusively "a matter for the tribe." *Held:* An Indian prosecuted in federal court under the Act is entitled to a jury instruction on lesser included offenses, if the facts warrant. Such an instruction would not expand the reach of the Act or permit the Government to infringe the residual jurisdiction of the Indian tribes by bringing in federal court prosecutions not authorized by statute. Pp. 207-214.

459 F. 2d 757 and 762, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, WHITE, MARSHALL, and BLACKMUN, JJ., joined. STEWART, J., filed a dissenting opinion, in which POWELL and REHNQUIST, JJ., joined, *post*, p. 215.

Mark V. Meierhenry argued the cause and filed a brief for petitioner *pro hac vice*.

Richard B. Stone argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Petersen, Deputy Solicitor General Lacovara, Harry R. Sachse,* and *Jerome M. Feit*.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Major Crimes Act of 1885 [1] authorizes the prosecution in federal court of an Indian charged with the com-

[1] Act of Mar. 3, 1885, c. 341, § 9, 23 Stat. 385, now 18 U. S. C. §§ 1153, 3242.

mission on an Indian reservation of certain specifically enumerated offenses.[2] This case requires us to decide whether an Indian prosecuted under the Act is entitled to a jury instruction on a lesser included offense where that lesser offense is not one of the crimes enumerated in the Act.

At the close of petitioner's trial for assault with intent to commit serious bodily injury, the United States District Court for the District of South Dakota refused to instruct the jury, as petitioner requested, that they might convict him of simple assault. The court reasoned that since simple assault is not an offense enumerated in the Act, it is exclusively "a matter for the tribe." App. 15. A panel of the United States Court of Appeals for the Eighth Circuit, one judge dissenting, upheld that determination on the strength of the court's earlier de-

[2] As originally enacted, the statute provided:

"That immediately upon and after the date of the passage of this act all Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." 23 Stat. 385.

By successive amendments, Congress has increased the number of enumerated crimes from seven to 13, adding carnal knowledge, assault with intent to commit rape, incest, assault with a dangerous weapon, assault resulting in serious bodily injury, and robbery.

cision in *Kills Crow* v. *United States*, 451 F. 2d 323 (1971). 459 F. 2d 757 (1972). Following a remand to the District Court for a hearing on an unrelated issue,[3] the case returned to the Court of Appeals and the conviction was affirmed. *Id.*, at 762 (supplemental opinion). We granted certiorari limited to the question of the validity of denying the requested instruction,[4] 409 U. S. 1037 (1972), and we reverse.

The events that led to the death of petitioner's brother-in-law, Robert Pomani, and hence to this criminal prosecution, took place on the South Dakota Reservation of the Crow Creek Sioux Tribe. Petitioner and the deceased, both Indians of that Tribe, spent the evening of March 6, 1971, drinking and quarreling over petitioner's alleged mistreatment of his wife, Pomani's sister. The argument soon became violent, and it ended only when petitioner, having beaten Pomani severely and left him bleeding from the head and face, went to bed. The next morning he discovered Pomani's lifeless body on the ground a short distance from the house where the beating had occurred. He reported the death to an official of the Department of the Interior serving as Captain of the Tribal Police at Fort Thompson, South Dakota. An autopsy revealed that Pomani died because of exposure to excessive cold, although the beating was a contributing factor. Petitioner was convicted of assault with intent to inflict great bodily injury, and sentenced to five years' imprisonment.

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[3] The case was remanded to the District Court for a hearing on the voluntariness of petitioner's confession, in light of the requirements of 18 U. S. C. § 3501. On remand, the District Court concluded that the confession was voluntary, notwithstanding a lapse of time between petitioner's arrest and his confession.

[4] The petition for certiorari also asked us to consider the validity of admitting petitioner's confession in view of the requirements of Fed. Rule Crim. Proc. 5 (a).

Although the lesser included offense doctrine developed at common law to assist the prosecution in cases where the evidence failed to establish some element of the offense originally charged,[5] it is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater. The Federal Rules of Criminal Procedure deal with lesser included offenses, see Rule 31 (c),[6] and the defendant's right to such an instruction has been recognized in numerous decisions of this Court. See, *e. g.*, *Sansone* v. *United States*, 380 U. S. 343, 349 (1965); *Berra* v. *United States*, 351 U. S. 131, 134 (1956); *Stevenson* v. *United States*, 162 U. S. 313 (1896).[7]

In defending the trial court's refusal to offer the requested instruction, the Government does not dispute this general proposition, nor does it argue that a lesser offense instruction was incompatible with the evidence presented at trial. Cf. *Sansone* v. *United States, supra; Sparf* v. *United States*, 156 U. S. 51, 63–64 (1895). On the contrary, the Government explicitly concedes that any non-Indian who had committed this same act on this same reservation and requested this same

[5] See *Kelly* v. *United States*, 125 U. S. App. D. C. 205, 207, 370 F. 2d 227, 229 (1966); *United States* v. *Markis*, 352 F. 2d 860, 866 (CA2 1965); 2 C. Wright, Federal Practice and Procedure—Criminal § 515, p. 372 (1969).

[6] Rule 31 (c) provides that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense." The rule codified pre-existing law, in particular former § 565 of Tit. 18, Act of June 1, 1872, § 9, 17 Stat. 198. See *Berra* v. *United States*, 351 U. S. 131, 134 and n. 6 (1956).

[7] See also, *e. g.*, *Government of Virgin Islands* v. *Carmona*, 422 F. 2d 95, 100 (CA3 1970); *United States* v. *Comer*, 137 U. S. App. D. C. 214, 218, 421 F. 2d 1149, 1153 (1970).

instruction would have been entitled to the jury charge that petitioner was refused. Brief for the United States 13 n. 16.[8] The Government does maintain, however, that the Major Crimes Act precludes the District Court from offering a lesser offense instruction on behalf of an Indian, such as the petitioner before us. Specifically, the Government contends that the Act represents a carefully limited intrusion of federal power into the otherwise exclusive jurisdiction of the Indian tribes to punish Indians for crimes committed on Indian land. To grant an instruction on the lesser offense of simple assault would, in the Government's view, infringe the tribe's residual jurisdiction in a manner inconsistent with the Act. Under the Government's approach, in other words, the interests of an individual Indian defendant in obtaining a jury instruction on a lesser offense must fall before the congressionally sanctioned interests of the tribe in preserving its inherent jurisdiction. Since that conclusion is compelled neither by the language, nor the purposes, nor the history of the Act, we cannot agree.

The Major Crimes Act was passed by Congress in direct response to the decision of this Court in *Ex parte Crow Dog*, 109 U. S. 556 (1883). The Court held there that a federal court lacked jurisdiction to try an Indian for the murder of another Indian, a chief of the Brule Sioux named Spotted Tail, in Indian country. Although recognizing the power of Congress to confer such jurisdiction on the federal courts,[9] the Court reasoned that, in

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[8] If a non-Indian had committed this same act on an Indian reservation, he would, of course, be tried in federal court under federal enclave law. 18 U. S. C. § 1152.

[9] The constitutionality of the Major Crimes Act was upheld in *United States* v. *Kagama*, 118 U. S. 375 (1886), where the Court rejected the argument that punishment of criminal offenses by Indians on Indian land is exclusively a state function.

the absence of explicit congressional direction, the Indian tribe retained exclusive jurisdiction to punish the offense. Cf. *Talton* v. *Mayes*, 163 U. S. 376 (1896); *Worcester* v. *Georgia*, 6 Pet. 515 (1832).

The prompt congressional response—conferring jurisdiction on the federal courts to punish certain offenses—reflected a view that tribal remedies were either nonexistent or incompatible with principles that Congress thought should be controlling. Representative Cutcheon, sponsor of the Act, described the events that followed the reversal by this Court of Crow Dog's conviction:

> "Thus Crow Dog went free. He returned to his reservation, feeling, as the Commissioner says, a great deal more important than any of the chiefs of his tribe. The result was that another murder grew out of that—a murder committed by Spotted Tail, jr., upon White Thunder. And so these things must go on unless we adopt proper legislation on the subject.
>
> "It is an infamy upon our civilization, a disgrace to this nation, that there should be anywhere within its boundaries a body of people who can, with absolute impunity, commit the crime of murder, there being no tribunal before which they can be brought for punishment. Under our present law there is no penalty that can be inflicted except according to the custom of the tribe, which is simply that the 'blood-avenger'—that is, the next of kin to the person murdered—shall pursue the one who has been guilty of the crime and commit a new murder upon him. . . .
>
> "If . . . an Indian commits a crime against an Indian on an Indian reservation there is now no law to punish the offense except, as I have said, the

> law of the tribe, which is just no law at all." 16 Cong. Rec. 934 (1885).[10]

The Secretary of the Interior, who supported the Act, struck a similar note:

> "If offenses of this character [the killing of Spotted Tail] can not be tried in the courts of the United States, there is no tribunal in which the crime of murder can be punished. Minor offenses may be punished through the agency of the 'court of Indian offenses,' but it will hardly do to leave the punishment of the crime of murder to a tribunal that exists only by the consent of the Indians of the reservation. If the murderer is left to be punished according to the old Indian custom, it becomes the duty of the next of kin to avenge the death of his relative by either killing the murderer or some one of his kinsmen . . . ." [11]

In short, Congress extended federal jurisdiction to crimes committed by Indians on Indian land out of a conviction that many Indians would "be civilized a great deal sooner by being put under [federal criminal] laws and taught to regard life and the personal property of

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[10] The same congressional purpose is evident in the most recent amendment to the Act, the 1968 addition to the list of enumerated crimes of the offense of assault resulting in serious bodily injury. See S. Rep. No. 721, 90th Cong., 1st Sess., 32 (1967):

"Without this amendment an Indian can commit a serious crime and receive only a maximum sentence of 6 months. Since Indian courts cannot impose more than a 6-month sentence, the crime of aggravated assault should be prosecuted in a Federal court, where the punishment will be in proportion to the gravity of the offense."

[11] The remark, from the Secretary's annual report, was quoted by Representative Cutcheon during debate in the House of Representatives on the proposed statute. 16 Cong. Rec. 935 (1885).

others." 16 Cong. Rec. 936 (1885) (remarks of Rep. Cutcheon). That is emphatically not to say, however, that Congress intended to deprive Indian defendants of procedural rights guaranteed to other defendants, or to make it easier to convict an Indian than any other defendant. Indeed, the Act expressly provides that Indians charged under its provisions "shall be tried in the same courts, *and in the same manner,* as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." 18 U. S. C. § 3242 (emphasis added).[12] In the face of that explicit statutory direction, we can hardly conclude that Congress intended to disqualify Indians from the benefits of a lesser offense instruction, when those benefits are made available to any non-Indian charged with the same offense.

Moreover, it is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of

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[12] In making the most recent amendment to the Major Crimes Act, see n. 10, *supra,* Congress neglected to add the offense of assault resulting in serious bodily injury to both of the sections in which the Act is now codified. The Government concedes that the failure to add this new offense to the list of those enumerated in 18 U. S. C. § 3242 is "probably a congressional oversight." Brief for the United States 18 n. 17. In any case, Congress plainly did not intend to provide a special rule for the trial of Indians charged with assault resulting in serious bodily injury.

the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction. In the case before us, for example, an intent to commit serious bodily injury is a necessary element of the crime with which petitioner was charged, but not of the crime of simple assault. Since the nature of petitioner's intent was very much in dispute at trial, the jury could rationally have convicted him of simple assault if that option had been presented. But the jury was presented with only two options: convicting the defendant of assault with intent to commit great bodily injury, or acquitting him outright. We cannot say that the availability of a third option—convicting the defendant of simple assault—could not have resulted in a different verdict. Indeed, while we have never explicitly held that the Due Process Clause of the Fifth Amendment guarantees the right of a defendant to have the jury instructed on a lesser included offense, it is nevertheless clear that a construction of the Major Crimes Act to preclude such an instruction would raise difficult constitutional questions. In view of our interpretation of the Act, those are questions that we need not face.[13]

[13] Similarly, in view of our conclusion that the trial court erred in denying the requested instruction, we need not decide whether an apparent defect in the indictment—a defect to which petitioner did not object—provides an independent ground for reversal. The Major Crimes Act provides that an Indian may be tried in federal court for the offense of assault resulting in serious bodily injury. The statute further provides that this offense "shall be defined and punished in accordance with the laws of the State in which such offense was committed." Petitioner was not charged, however, with assault resulting in serious bodily injury, but rather with assault with intent to commit serious bodily injury. See S. D. Comp. Laws Ann. § 22–18–12 (1967). The South Dakota criminal code does not specifically proscribe the offense of assault resulting in serious bodily injury. Whether the prosecution should have been required to prove

Finally, we emphasize that our decision today neither expands the reach of the Major Crimes Act nor permits the Government to infringe the residual jurisdiction of a tribe by bringing prosecutions in federal court that are not authorized by statute.[14] We hold only that where an Indian is prosecuted in federal court under the provisions of the Act, the Act does not require that he be deprived of the protection afforded by an instruction on a lesser included offense, assuming of course that the evidence warrants such an instruction. No interest of a tribe is jeopardized by this decision. Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

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not only that the petitioner *intended to commit* serious bodily injury, but also that the assault *resulted in* serious bodily injury, is a question we do not now decide.

[14] The Government argues that "[t]he ruling petitioner seeks would, under the principle of mutuality, empower federal prosecutors, dissatisfied with the leniency of tribal courts, to prosecute in marginal cases, knowing that if the major offense is not proved the penalty for the minor offense would be more substantial than in the tribal courts." Brief for the United States 22. The lower courts have often held that a defendant is entitled to an instruction on a lesser included offense only in circumstances where the prosecution could also ask for such an instruction. See, *e. g.*, *Kelly* v. *United States*, 125 U. S. App. D. C. 205, 207, 370 F. 2d 227, 229 (1966). That is the principle of mutuality to which the Government refers. Nevertheless, Judge Wilkey, speaking for a panel of the Court of Appeals for the District of Columbia Circuit, recently concluded that "despite the patina of antiquity, considerations of justice and good judicial administration warrant dispensing with mutuality as an essential prerequisite to the defense's right to a lesser included offense charge." *United States* v. *Whitaker*, 144 U. S. App. D. C. 344, 351, 447 F. 2d 314, 321 (1971). Whether that conclusion is sound, at least in the special situation presented by the case before us, is a question that we need not now decide.

MR. JUSTICE STEWART, with whom MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST join, dissenting.

As the opinion of the Court demonstrates, the Major Crimes Act, 18 U. S. C. §§ 1153, 3242, was enacted in response to this Court's decision in *Ex parte Crow Dog*, 109 U. S. 556. The Act conferred jurisdiction upon federal district courts over certain *enumerated* crimes committed by Indians on an Indian reservation, leaving tribal jurisdiction intact as to all other crimes. An Indian tried in a federal court under the Act is guaranteed equal procedural rights, 18 U. S. C. § 3242, including the benefits and burdens of Fed. Rule Crim. Proc. 31 (c), dealing with a lesser included offense.

In these respects, I agree with the Court. But the Court goes on to hold "that where an Indian is prosecuted in federal court under the provisions of the Act, the Act does not require that he be deprived of the protection afforded by an instruction on a lesser included offense. . . ." *Ante*, at 214. I think this holding would be correct only if the lesser included offense were one over which the federal court had jurisdiction. Because the trial court did not have jurisdiction over the "lesser included offense" in the present case, I must respectfully dissent.[1]

It is a commonplace that federal courts are courts of limited jurisdiction, and that there are no common-law offenses against the United States. "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence." *United States* v. *Hudson*, 7 Cranch 32, 34. "It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms."

[1] The Court does not reach any other possible ground for reversing this conviction, and, accordingly, neither do I.

Todd v. *United States*, 158 U. S. 278, 282. See 1 J. Moore, Federal Practice ¶ 0.60 [7]. And it is also clear that simple assault by an Indian on an Indian reservation, the purported "lesser included offense" in this case, comes within no federal jurisdictional statute. The Court in effect holds that Fed. Rule Crim. Proc. 31 (c) implicitly operates to confer federal jurisdiction over simple assault in the circumstances of this case, and with all respect this seems to me a holding utterly without support.

The Rule states that:

> "The defendant may be found guilty of an offense necessarily included in the offense charged *or of an attempt* to commit either the offense charged or an offense necessarily included therein *if the attempt is an offense.*" (Emphasis added.)

The Rule is thus phrased in terms of "offenses." It seems to me clear that "offense" means federal offense, and this view is confirmed by the fact that by virtue of the Rule a lesser included offense instruction is authorized with respect to "an attempt" only where the attempt itself is also a federal crime.

The conclusion that a lesser included offense instruction is possible only when the lesser offense is within federal jurisdiction does not violate 18 U. S. C. § 3242, providing that Indians charged under its provisions "shall be tried in the same courts, and in the same manner, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." For this conclusion would apply as well in any instance where Congress has established a divided criminal jurisdiction between a federal district court and another forum. See, *e. g.*, *DeFlumer* v. *Mancusi*, 443 F. 2d 940 (criminal jurisdiction in federal district court over 16-year-old defendants only when charged with certain enumerated crimes). Congress established jurisdiction

in the federal district courts only over certain specifically enumerated offenses committed by Indians on Indian reservations. It vested a residual jurisdiction in other forums over all other offenses. Accordingly, I conclude that a lesser included offense instruction would have been improper in the present case, where the federal court had no jurisdiction over the lesser offense of simple assault.[2] See *Kills Crow* v. *United States,* 451 F. 2d 323, 325.

The Court seems to agree that a United States Attorney could not seek an indictment in a federal district court of an Indian for simple assault committed on an Indian reservation. This being so, I can find no basis for concluding that jurisdiction comes into being simply by motion of the defense. "It needs no citation of authorities to show that the mere consent of parties cannot confer upon a court of the United States the jurisdiction to hear and decide a case." *People's Bank* v. *Calhoun,* 102 U. S. 256, 260–261. See also 1 J. Moore, Federal Practice ¶ 0.60 [4]. Were the petitioner's motion for an instruction on simple assault to be granted, and were a jury to convict on that offense, I should have supposed until the Court's decision today that the conviction could have been set aside for want of jurisdiction.

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[2] The petitioner was not charged with "assault resulting in serious bodily injury," the offense specified in the Major Crimes Act, but instead with assault with intent to commit serious bodily injury, S. D. Comp. Laws Ann. § 22–18–12 (1967). This was apparently because the Major Crimes Act provides that "assault resulting in serious bodily injury" is to be "defined and punished in accordance with the laws of the State in which such offense was committed." Since South Dakota appears to have no statute identically matching the offense described in the Major Crimes Act, § 22–18–12 of the South Dakota Laws was relied upon to prosecute the offense charged here. See also *Kills Crow* v. *United States,* 451 F. 2d 323. In a case where no serious bodily injury occurred, a defendant might well argue that his prosecution under this state law definition is no more under the jurisdiction of a federal district court than would be a prosecution for simple assault.

SCHNECKLOTH, CONSERVATION CENTER SUPERINTENDENT *v.* BUSTAMONTE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71–732. Argued October 10, 1972—Decided May 29, 1973

During the course of a consent search of a car that had been stopped by officers for traffic violations, evidence was discovered that was used to convict respondent of unlawfully possessing a check. In a habeas corpus proceeding, the Court of Appeals, reversing the District Court, held that the prosecution had failed to prove that consent to the search had been made with the understanding that it could freely be withheld. *Held:* When the subject of a search is not in custody and the State would justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntary; voluntariness is to be determined from the totality of the surrounding circumstances. While knowledge of a right to refuse consent is a factor to be taken into account, the State need not prove that the one giving permission to search knew that he had a right to withhold his consent. Pp. 223–249.

448 F. 2d 699, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post,* p. 249. POWELL, J., filed a concurring opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post,* p. 250. DOUGLAS, J., *post,* p. 275, BRENNAN, J., *post,* p. 276, and MARSHALL, J., *post,* p. 277, filed dissenting opinions.

Robert R. Granucci, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *Evelle J. Younger,* Attorney General, *Herbert L. Ashby,* Chief Assistant Attorney General, *Doris H. Maier,* Assistant Attorney General, and *Edward P. O'Brien,* Deputy Attorney General

Stuart P. Tobisman, by appointment of the Court,

405 U. S. 1062, argued the cause and filed a brief for respondent *pro hac vice.**

MR. JUSTICE STEWART delivered the opinion of the Court.

It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is "*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U. S. 347, 357; *Coolidge* v. *New Hampshire*, 403 U. S. 443, 454–455; *Chambers* v. *Maroney*, 399 U. S. 42, 51. It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent. *Davis* v. *United States*, 328 U. S. 582, 593–594; *Zap* v. *United States*, 328 U. S. 624, 630. The constitutional question in the present case concerns the definition of "consent" in this Fourth and Fourteenth Amendment context.

I

The respondent was brought to trial in a California court upon a charge of possessing a check with intent to defraud.[1] He moved to suppress the introduction of certain material as evidence against him on the ground that the material had been acquired through an unconstitutional search and seizure. In response to the motion, the trial judge conducted an evidentiary hearing

**William J. Scott*, Attorney General, and *James B. Zagel* and *Jayne A. Carr*, Assistant Attorneys General, filed a brief for the State of Illinois et al. as *amici curiae* urging reversal.

Melvin L. Wulf, *Sanford J. Rosen*, *Joel M. Gora*, *A. L. Wirin*, *Fred Okrand*, and *Lawrence R. Sperber* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

[1] Cal. Penal Code § 475a.

where it was established that the material in question had been acquired by the State under the following circumstances:

While on routine patrol in Sunnyvale, California, at approximately 2:40 in the morning, Police Officer James Rand stopped an automobile when he observed that one headlight and its license plate light were burned out. Six men were in the vehicle. Joe Alcala and the respondent, Robert Bustamonte, were in the front seat with Joe Gonzales, the driver. Three older men were seated in the rear. When, in response to the policeman's question, Gonzales could not produce a driver's license, Officer Rand asked if any of the other five had any evidence of identification. Only Alcala produced a license, and he explained that the car was his brother's. After the six occupants had stepped out of the car at the officer's request and after two additional policemen had arrived, Officer Rand asked Alcala if he could search the car. Alcala replied, "Sure, go ahead." Prior to the search no one was threatened with arrest and, according to Officer Rand's uncontradicted testimony, it "was all very congenial at this time." Gonzales testified that Alcala actually helped in the search of the car, by opening the trunk and glove compartment. In Gonzales' words: "[T]he police officer asked Joe [Alcala], he goes, 'Does the trunk open?' And Joe said, 'Yes.' He went to the car and got the keys and opened up the trunk." Wadded up under the left rear seat, the police officers found three checks that had previously been stolen from a car wash.

The trial judge denied the motion to suppress, and the checks in question were admitted in evidence at Bustamonte's trial. On the basis of this and other evidence he was convicted, and the California Court of Appeal for the First Appellate District affirmed the convic-

tion. 270 Cal. App. 2d 648, 76 Cal. Rptr. 17. In agreeing that the search and seizure were constitutionally valid, the appellate court applied the standard earlier formulated by the Supreme Court of California in an opinion by then Justice Traynor: "Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances." *People* v. *Michael,* 45 Cal. 2d 751, 753, 290 P. 2d 852, 854. The appellate court found that "[i]n the instant case the prosecution met the necessary burden of showing consent . . . since there were clearly circumstances from which the trial court could ascertain that consent had been freely given without coercion or submission to authority. Not only officer Rand, but Gonzales, the driver of the automobile, testified that Alcala's assent to the search of his brother's automobile was freely, even casually given. At the time of the request to search the automobile the atmosphere, according to Rand, was 'congenial' and there had been no discussion of any crime. As noted, Gonzales said Alcala even attempted to aid in the search." 270 Cal. App. 2d, at 652, 76 Cal. Rptr., at 20. The California Supreme Court denied review.[2]

Thereafter, the respondent sought a writ of habeas corpus in a federal district court. It was denied.[3] On appeal, the Court of Appeals for the Ninth Circuit, relying on its prior decisions in *Cipres* v. *United States,* 343 F. 2d 95, and *Schoepflin* v. *United States,* 391 F. 2d 390, set aside the District Court's order. 448 F. 2d 699. The appellate court reasoned that a consent was a waiver of a person's Fourth and Fourteenth Amendment rights, and that the State was under an obligation to demon-

[2] The order of the California Supreme Court is unreported.

[3] The decision of the District Court is unreported.

strate, not only that the consent had been uncoerced, but that it had been given with an understanding that it could be freely and effectively withheld. Consent could not be found, the court held, solely from the absence of coercion and a verbal expression of assent. Since the District Court had not determined that Alcala had *known* that his consent could have been withheld and that he could have refused to have his vehicle searched, the Court of Appeals vacated the order denying the writ and remanded the case for further proceedings. We granted certiorari to determine whether the Fourth and Fourteenth Amendments require the showing thought necessary by the Court of Appeals. 405 U. S. 953.

II

It is important to make it clear at the outset what is not involved in this case. The respondent concedes that a search conducted pursuant to a valid consent is constitutionally permissible. In *Katz* v. *United States*, 389 U. S., at 358, and more recently in *Vale* v. *Louisiana*, 399 U. S. 30, 35, we recognized that a search authorized by consent is wholly valid. See also *Davis* v. *United States*, 328 U. S., at 593–594; *Zap* v. *United States*, 328 U. S., at 630.[4] And similarly the State concedes that "[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given." *Bumper* v. *North Carolina*, 391 U. S. 543, 548. See also *Johnson* v. *United States*, 333 U. S. 10; *Amos* v. *United States*, 255 U. S. 313.

[4] "One would expect a hard-headed system like the common law to recognize exceptions even to the most comprehensive principle for safeguarding liberty. This is true of the prohibition of all searches and seizures as unreasonable unless authorized by a judicial warrant appropriately supported." *Davis* v. *United States*, 328 U. S. 582, 609 (Frankfurter, J., dissenting).

The precise question in this case, then, is what must the prosecution prove to demonstrate that a consent was "voluntarily" given. And upon that question there is a square conflict of views between the state and federal courts that have reviewed the search involved in the case before us. The Court of Appeals for the Ninth Circuit concluded that it is an essential part of the State's initial burden to prove that a person knows he has a right to refuse consent. The California courts have followed the rule that voluntariness is a question of fact to be determined from the totality of all the circumstances, and that the state of a defendant's knowledge is only one factor to be taken into account in assessing the voluntariness of a consent. See, *e. g.*, *People* v. *Tremayne*, 20 Cal. App. 3d 1006, 98 Cal. Rptr. 193; *People* v. *Roberts*, 246 Cal. App. 2d 715, 55 Cal. Rptr. 62.

A

The most extensive judicial exposition of the meaning of "voluntariness" has been developed in those cases in which the Court has had to determine the "voluntariness" of a defendant's confession for purposes of the Fourteenth Amendment. Almost 40 years ago, in *Brown* v. *Mississippi*, 297 U. S. 278, the Court held that a criminal conviction based upon a confession obtained by brutality and violence was constitutionally invalid under the Due Process Clause of the Fourteenth Amendment. In some 30 different cases decided during the era that intervened between *Brown* and *Escobedo* v. *Illinois*, 378 U. S. 478, the Court was faced with the necessity of determining whether in fact the confessions in issue had been "voluntarily" given.[5] It is to that body

[5] See *Miranda* v. *Arizona*, 384 U. S. 436, 507, and n. 3 (Harlan, J., dissenting); *Spano* v. *New York*, 360 U. S. 315, 321 n. 2 (citing 28 cases).

of case law to which we turn for initial guidance on the meaning of "voluntariness" in the present context.[6]

Those cases yield no talismanic definition of "voluntariness," mechanically applicable to the host of situations where the question has arisen. "The notion of 'voluntariness,'" Mr. Justice Frankfurter once wrote, "is itself an amphibian." *Culombe* v. *Connecticut,* 367 U. S. 568, 604–605. It cannot be taken literally to mean a "knowing" choice. "Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice, all incriminating statements—even those made under brutal treatment—are 'voluntary' in the sense of representing a choice of alternatives. On the other hand, if 'voluntariness' incorporates notions of 'but-for' cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind."[7] It is thus evident that neither linguistics nor epistemology will provide a ready definition of the meaning of "voluntariness."

Rather, "voluntariness" has reflected an accommodation of the complex of values implicated in police ques-

[6] Similarly, when we recently considered the meaning of a "voluntary" guilty plea, we returned to the standards of "voluntariness" developed in the coerced-confession cases. See *Brady* v. *United States,* 397 U. S. 742, 749. See also n. 25, *infra.*

[7] Bator & Vorenberg, Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions, 66 Col. L. Rev. 62, 72–73. See also 3 J. Wigmore, Evidence § 826 (J. Chadbourn rev. 1970): "When, for example threats are used, the situation is one of choice between alternatives, either one disagreeable, to be sure, but still subject to a choice. As between the rack and a confession, the latter would usually be considered the less disagreeable; but it is nonetheless a voluntary choice."

tioning of a suspect. At one end of the spectrum is the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws. See *Culombe* v. *Connecticut, supra,* at 578–580. Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished. *Haynes* v. *Washington,* 373 U. S. 503, 515. At the other end of the spectrum is the set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice. "[I]n cases involving involuntary confessions, this Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will." *Blackburn* v. *Alabama,* 361 U. S. 199, 206–207. See also *Culombe* v. *Connecticut, supra,* at 581–584; *Chambers* v. *Florida,* 309 U. S. 227, 235–238.

This Court's decisions reflect a frank recognition that the Constitution requires the sacrifice of neither security nor liberty. The Due Process Clause does not mandate that the police forgo all questioning, or that they be given carte blanche to extract what they can from a suspect. "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his

confession offends due process." *Culombe* v. *Connecticut, supra,* at 602.

In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, *e. g., Haley* v. *Ohio,* 332 U. S. 596; his lack of education, *e. g., Payne* v. *Arkansas,* 356 U. S. 560; or his low intelligence, *e. g., Fikes* v. *Alabama,* 352 U. S. 191; the lack of any advice to the accused of his constitutional rights, *e. g., Davis* v. *North Carolina,* 384 U. S. 737; the length of detention, *e. g., Chambers* v. *Florida, supra;* the repeated and prolonged nature of the questioning, *e. g., Ashcraft* v. *Tennessee,* 322 U. S. 143; and the use of physical punishment such as the deprivation of food or sleep, *e. g., Reck* v. *Pate,* 367 U. S. 433.[8] In all of these cases, the Court determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted. *Culombe* v. *Connecticut, supra,* at 603.

The significant fact about all of these decisions is that none of them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances. See *Miranda* v. *Arizona,* 384 U. S. 436, 508 (Harlan, J., dissenting); *id.,* at 534–535 (WHITE, J., dissenting). In none of them did the Court rule that the Due Process Clause required the prosecution to prove as part of its

[8] See generally *Miranda* v. *Arizona,* 384 U. S., at 508 (Harlan, J., dissenting); 3 J. Wigmore, Evidence § 826 (J. Chadbourn rev. 1970); Note, Developments in the Law: Confessions, 79 Harv. L. Rev. 938, 954–984.

initial burden that the defendant knew he had a right to refuse to answer the questions that were put. While the state of the accused's mind, and the failure of the police to advise the accused of his rights, were certainly factors to be evaluated in assessing the "voluntariness" of an accused's responses, they were not in and of themselves determinative. See, *e. g., Davis* v. *North Carolina, supra; Haynes* v. *Washington, supra,* at 510–511; *Culombe* v. *Connecticut, supra,* at 610; *Turner* v. *Pennsylvania,* 338 U. S. 62, 64.

B

Similar considerations lead us to agree with the courts of California that the question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent. As with police questioning, two competing concerns must be accommodated in determining the meaning of a "voluntary" consent—the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.

In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence.[9] In the present case for example, while the police had reason to stop the car for traffic violations, the State does not contend that there was probable cause to search the vehicle or that the search was incident to a valid arrest

[9] See Note, Consent Searches: A Reappraisal After Miranda v. Arizona, 67 Col. L. Rev. 130, 130–131.

of any of the occupants.[10] Yet, the search yielded tangible evidence that served as a basis for a prosecution, and provided some assurance that others, wholly innocent of the crime, were not mistakenly brought to trial. And in those cases where there is probable cause to arrest or search, but where the police lack a warrant, a consent search may still be valuable. If the search is conducted and proves fruitless, that in itself may convince the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified. In short, a search pursuant to consent may result in considerably less inconvenience for the subject of the search, and, properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity.

But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed. In the words of the classic admonition in *Boyd* v. *United States,* 116 U. S. 616, 635:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close

[10] If there had been probable cause for the search of the automobile, a search warrant would not have been necessary in this case. See *Brinegar* v. *United States,* 338 U. S. 160; *Carroll* v. *United States,* 267 U. S. 132.

> and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

The problem of reconciling the recognized legitimacy of consent searches with the requirement that they be free from any aspect of official coercion cannot be resolved by any infallible touchstone. To approve such searches without the most careful scrutiny would sanction the possibility of official coercion; to place artificial restrictions upon such searches would jeopardize their basic validity. Just as was true with confessions, the requirement of a "voluntary" consent reflects a fair accommodation of the constitutional requirements involved. In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. Those searches that are the product of police coercion can thus be filtered out without undermining the continuing validity of consent searches. In sum, there is no reason for us to depart in the area of consent searches, from the traditional definition of "voluntariness."

The approach of the Court of Appeals for the Ninth Circuit finds no support in any of our decisions that have attempted to define the meaning of "voluntariness." Its ruling, that the State must affirmatively prove that the subject of the search knew that he had a right to refuse consent, would, in practice, create serious doubt whether consent searches could continue to be conducted. There might be rare cases where it could be proved from the record that a person in fact affirmatively knew of his

right to refuse—such as a case where he announced to the police that if he didn't sign the consent form, "you [police] are going to get a search warrant;" [11] or a case where by prior experience and training a person had clearly and convincingly demonstrated such knowledge.[12] But more commonly where there was no evidence of any coercion, explicit or implicit, the prosecution would nevertheless be unable to demonstrate that the subject of the search in fact had known of his right to refuse consent.

The very object of the inquiry—the nature of a person's subjective understanding—underlines the difficulty of the prosecution's burden under the rule applied by the Court of Appeals in this case. Any defendant who was the subject of a search authorized solely by his consent could effectively frustrate the introduction into evidence of the fruits of that search by simply failing to testify that he in fact knew he could refuse to consent. And the near impossibility of meeting this prosecutorial burden suggests why this Court has never accepted any such litmus-paper test of voluntariness. It is instructive to recall the fears of then Justice Traynor of the California Supreme Court:

> "[I]t is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes. Such inquiries, although courteously made and not accompanied with any assertion of a right to enter or search or secure answers, would permit the criminal to defeat his prosecution by voluntarily revealing all of the evidence against him and then contending that he acted only in response to an implied assertion of

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[11] *United States* v. *Curiale*, 414 F. 2d 744, 747.

[12] Cf. *Rosenthall* v. *Henderson*, 389 F. 2d 514, 516.

unlawful authority." *People* v. *Michael,* 45 Cal. 2d, at 754, 290 P. 2d, at 854.

One alternative that would go far toward proving that the subject of a search did know he had a right to refuse consent would be to advise him of that right before eliciting his consent. That, however, is a suggestion that has been almost universally repudiated by both federal [13] and state courts,[14] and, we think, rightly so. For it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning. Consent searches are part of the standard investigatory techniques of law enforcement

[13] See, *e. g., Gorman* v. *United States,* 380 F. 2d 158, 164 (CA1); *United States ex rel. Cole* v. *Mancusi,* 429 F. 2d 61, 66 (CA2); *United States ex rel. Harris* v. *Hendricks,* 423 F. 2d 1096, 1101 (CA3); *United States* v. *Vickers,* 387 F. 2d 703, 707 (CA4); *United States* v. *Goosbey,* 419 F. 2d 818 (CA6); *United States* v. *Noa,* 443 F. 2d 144, 147 (CA9); *Leeper* v. *United States,* 446 F. 2d 281, 284 (CA10). But see, *United States* v. *Nikrasch,* 367 F. 2d 740, 744 (CA7); *United States* v. *Moderacki,* 280 F. Supp. 633 (Del.); *United States* v. *Blalock,* 255 F. Supp. 268 (ED Pa.). While there is dictum in *Nikrasch* to the effect that warnings are necessary for an effective Fourth Amendment consent, the Court of Appeals for the Seventh Circuit subsequently recanted that position and termed it "of dubious propriety." *Byrd* v. *Lane,* 398 F. 2d 750, 755. The Court of Appeals limited *Nikrasch* to its facts—a case where a suspect arrested on a disorderly conduct charge and incarcerated for eight hours "consented" from his jail cell to a search of his car.

[14] See, *e. g., People* v. *Roberts,* 246 Cal. App. 2d 715, 55 Cal. Rptr. 62; *People* v. *Dahlke,* 257 Cal. App. 2d 82, 64 Cal. Rptr. 599; *State* v. *Custer,* 251 So. 2d 287 (Fla. App.); *State* v. *Oldham,* 92 Idaho 124, 438 P. 2d 275; *State* v. *McCarty,* 199 Kan. 116, 427 P. 2d 616, vacated in part on other grounds, 392 U. S. 308; *Hohnke* v. *Commonwealth,* 451 S. W. 2d 162 (Ky.); *State* v. *Andrus,* 250 La. 765, 199 So. 2d 867; *Morgan* v. *State,* 2 Md. App. 440, 234 A. 2d 762; *State* v. *Witherspoon,* 460 S. W. 2d 281 (Mo.); *State* v. *Forney,* 181 Neb. 757, 150 N. W. 2d 915; *State* v. *Douglas,* 260 Ore. 60, 488 P. 2d 1366.

agencies. They normally occur on the highway, or in a person's home or office, and under informal and unstructured conditions. The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning. The police may seek to investigate further suspicious circumstances or to follow up leads developed in questioning persons at the scene of a crime. These situations are a far cry from the structured atmosphere of a trial where, assisted by counsel if he chooses, a defendant is informed of his trial rights. Cf. *Boykin* v. *Alabama*, 395 U. S. 238, 243. And, while surely a closer question, these situations are still immeasurably far removed from "custodial interrogation" where, in *Miranda* v. *Arizona*, *supra*, we found that the Constitution required certain now familiar warnings as a prerequisite to police interrogation. Indeed, in language applicable to the typical consent search, we refused to extend the need for warnings:

> "Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . . When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement." 384 U. S., at 477–478.

Consequently, we cannot accept the position of the Court of Appeals in this case that proof of knowledge of the right to refuse consent is a necessary prerequisite

to demonstrating a "voluntary" consent. Rather, it is only by analyzing all the circumstances of an individual consent that it can be ascertained whether in fact it was voluntary or coerced. It is this careful sifting of the unique facts and circumstances of each case that is evidenced in our prior decisions involving consent searches.

For example, in *Davis* v. *United States,* 328 U. S. 582, federal agents enforcing wartime gasoline-rationing regulations, arrested a filling station operator and asked to see his rationing coupons. He eventually unlocked a room where the agents discovered the coupons that formed the basis for his conviction. The District Court found that the petitioner had consented to the search—that although he had at first refused to turn the coupons over, he had soon been persuaded to do so and that force or threat of force had not been employed to persuade him. Concluding that it could not be said that this finding was erroneous, this Court, in an opinion by MR. JUSTICE DOUGLAS that looked to all the circumstances surrounding the consent, affirmed the judgment of conviction: "The public character of the property, the fact that the demand was made during business hours at the place of business where the coupons were required to be kept, the existence of the right to inspect, the nature of the request, the fact that the initial refusal to turn the coupons over was soon followed by acquiescence in the demand—these circumstances all support the conclusion of the District Court." *Id.,* at 593–594. See also *Zap* v. *United States,* 328 U. S. 624.

Conversely, if under all the circumstances it has appeared that the consent was not given voluntarily—that it was coerced by threats or force, or granted only in submission to a claim of lawful authority—then we have found the consent invalid and the search unreasonable. See, *e. g., Bumper* v. *North Carolina,* 391 U. S., at 548–549; *Johnson* v. *United States,* 333 U. S. 10; *Amos* v.

United States, 255 U. S. 313. In *Bumper*, a 66-year-old Negro widow, who lived in a house located in a rural area at the end of an isolated mile-long dirt road, allowed four white law enforcement officials to search her home after they asserted they had a warrant to search the house. We held the alleged consent to be invalid, noting that "[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent." 391 U. S., at 550.

Implicit in all of these cases is the recognition that knowledge of a right to refuse is not a prerequisite of a voluntary consent. If the prosecution were required to demonstrate such knowledge, *Davis* and *Zap* could not have found consent without evidence of that knowledge. And similarly if the failure to prove such knowledge were sufficient to show an ineffective consent, the *Amos*, *Johnson*, and *Bumper* opinions would surely have focused upon the subjective mental state of the person who consented. Yet they did not.

In short, neither this Court's prior cases, nor the traditional definition of "voluntariness" requires proof of knowledge of a right to refuse as the *sine qua non* of an effective consent to a search.[15]

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[15] This view is bolstered by *Coolidge* v. *New Hampshire*, 403 U. S. 443. There the Court determined that a suspect's wife was not operating as an agent of the State when she handed over her husband's guns and clothing to the police. We found nothing constitutionally suspect in the subjective forces that impelled the spouse to cooperate with the police. "Among these are the simple but often powerful convention of openness and honesty, the fear that secretive behavior will intensify suspicion, and uncertainty as to what course is most likely to be helpful to the absent spouse." *Id.*, at 488. "The test . . . is whether Mrs. Coolidge, in light of all

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It is said, however, that a "consent" is a "waiver" of a person's rights under the Fourth and Fourteenth Amendments. The argument is that by allowing the police to conduct a search, a person "waives" whatever right he had to prevent the police from searching. It is argued that under the doctrine of *Johnson* v. *Zerbst*, 304 U. S. 458, 464, to establish such a "waiver" the State must demonstrate "an intentional relinquishment or abandonment of a known right or privilege."

But these standards were enunciated in *Johnson* in the context of the safeguards of a fair criminal trial. Our cases do not reflect an uncritical demand for a knowing and intelligent waiver in every situation where a person has failed to invoke a constitutional protection. As Mr. Justice Black once observed for the Court: " 'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law." *Green* v. *United States*, 355 U. S. 184, 191. With respect to procedural due process, for example, the Court has acknowledged that waiver is possible, while explicitly leaving open the question whether a "knowing and intelligent" waiver need be shown.[16] See *D. H. Overmyer Co.* v. *Frick Co.*,

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the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the state when she produced her husband's belongings." *Id.*, at 487.

Just as it was necessary in *Coolidge* to analyze the totality of the surrounding circumstances to assess the validity of Mrs. Coolidge's offer of evidence, it is equally necessary to assess all the circumstances surrounding a search where consent is obtained in response to an initial police question.

[16] *Johnson* v. *Zerbst*, 304 U. S. 458, itself relied on three civil cases, but none of those cases established the proposition that a waiver, to be effective, must be knowing and intelligent. *Hodges* v. *Easton*, 106 U. S. 408, which concerned the waiver of a civil jury trial by the submission of a special verdict to the jury, indicates only that "every

405 U. S. 174, 185–186; *Fuentes* v. *Shevin*, 407 U. S. 67, 94–96.[17]

The requirement of a "knowing" and "intelligent" waiver was articulated in a case involving the validity of a defendant's decision to forgo a right constitutionally guaranteed to protect a fair trial and the reliability of the truth-determining process. *Johnson* v. *Zerbst*, *supra*, dealt with the denial of counsel in a federal criminal trial. There the Court held that under the Sixth Amendment a criminal defendant is entitled to the assistance of counsel, and that if he lacks sufficient funds to retain counsel, it is the Government's obligation to furnish him with a lawyer. As Mr. Justice Black wrote for the Court: "The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious." 304 U. S., at 462–463 (footnote omitted). To preserve the fairness of the trial process the Court established an appropriately heavy burden on the Government before waiver could be found—"an in-

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reasonable presumption should be indulged against . . . waiver." *Id.*, at 412. *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389, is to the same effect. *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U. S. 292, which involved the possible waiver of procedural due process rights, stands only for the proposition that: "We do not presume acquiescence in the loss of fundamental rights." *Id.*, at 307.

[17] Cf. *Parden* v. *Terminal R. Co.*, 377 U. S. 184 (operation of common carrier railroad found to be waiver of State's sovereign immunity despite objection that there was no "waiver" under *Johnson*);

tentional relinquishment or abandonment of a known right or privilege." *Id.*, at 464.

Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial.[18] Hence, and hardly surprisingly in view of the facts of *Johnson* itself, the standard of a knowing and intelligent waiver has most often been applied to test the validity of a waiver of counsel, either at trial,[19] or upon a guilty plea.[20] And the Court has also applied the *Johnson* criteria to assess the effectiveness of a waiver of other trial rights such as the right to confrontation,[21] to a jury trial,[22] and to a speedy trial,[23] and the right to be free from

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National Equipment Rental, Ltd. v. *Szukhent*, 375 U. S. 311 (valid waiver of procedural due process found over objection of no compliance with *Johnson*). See also *Employees* v. *Missouri Public Health Dept.*, 411 U. S. 279, 296 (MARSHALL, J., concurring in result).

[18] One apparent exception was *Marchetti* v. *United States*, 390 U. S. 39, 51–52, where we found no meaningful waiver of the privilege against compulsory self-incrimination when a gambler was forced to pay a wagering tax. We reasoned that there could be no choice when the gambler was faced with the alternative of giving up gambling or providing incriminatory information. Analytically, therefore, although the Court cited *Johnson*, *Marchetti* turned on the lack of a "voluntary" waiver rather than the lack of any "knowing" and "intelligent" waiver.

[19] See, *e. g.*, *Glasser* v. *United States*, 315 U. S. 60; *Adams* v. *United States ex rel. McCann*, 317 U. S. 269; *Carnley* v. *Cochran*, 369 U. S. 506; cf. *Chessman* v. *Teets*, 354 U. S. 156 (no waiver of counsel shown at settlement of state court record).

[20] See, *e. g.*, *Von Moltke* v. *Gillies*, 332 U. S. 708; *Uveges* v. *Pennsylvania*, 335 U. S. 437; *Moore* v. *Michigan*, 355 U. S. 155; *Boyd* v. *Dutton*, 405 U. S. 1.

[21] See, *e. g.*, *Brookhart* v. *Janis*, 384 U. S. 1; *Barber* v. *Page*, 390 U. S. 719.

[22] See, *e. g.*, *Adams* v. *United States ex rel. McCann*, *supra*.

[23] See, *e. g.*, *Barker* v. *Wingo*, 407 U. S. 514.

twice being placed in jeopardy.[24] Guilty pleas have been carefully scrutinized to determine whether the accused knew and understood all the rights to which he would be entitled at trial, and that he had intentionally chosen to forgo them.[25] And the Court has evaluated the knowing and intelligent nature of the waiver of trial rights in trial-type situations, such as the waiver of the privilege against compulsory self-incrimination before an administrative agency [26] or a congressional committee,[27] or the waiver of counsel in a juvenile proceeding.[28]

The guarantees afforded a criminal defendant at trial also protect him at certain stages before the actual trial, and any alleged waiver must meet the strict standard of an intentional relinquishment of a "known" right. But the "trial" guarantees that have been applied to the "pre-

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[24] See, *e. g.*, *Green* v. *United States*, 355 U. S. 184.

[25] See, *e. g.*, *McCarthy* v. *United States*, 394 U. S. 459; *Boykin* v. *Alabama*, 395 U. S. 238.

Our cases concerning the validity of guilty pleas underscore the fact that the question whether a person has acted "voluntarily" is quite distinct from the question whether he has "waived" a trial right. The former question, as we made clear in *Brady* v. *United States*, 397 U. S., at 749, can be answered only by examining all the relevant circumstances to determine if he has been coerced. The latter question turns on the extent of his knowledge. We drew the same distinction in *McMann* v. *Richardson*, 397 U. S. 759, 766:

"A conviction after a plea of guilty normally rests on the defendant's own admission in open court that he committed the acts with which he is charged. . . . That admission may not be compelled, and since the plea is also a waiver of trial—and unless the applicable law otherwise provides, a waiver of the right to contest the admissibility of any evidence the State might have offered against the defendant—it must be an intelligent act 'done with sufficient awareness of the relevant circumstances and likely consequences.'" (Footnote omitted.)

[26] See, *e. g.*, *Smith* v. *United States*, 337 U. S. 137.

[27] See, *e. g.*, *Emspak* v. *United States*, 349 U. S. 190.

[28] See *In re Gault*, 387 U. S. 1, 42.

trial" stage of the criminal process are similarly designed to protect the fairness of the trial itself.

Hence, in *United States* v. *Wade,* 388 U. S. 218, and *Gilbert* v. *California,* 388 U. S. 263, the Court held "that a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth [and Fourteenth] Amendment right to counsel . . . ." *Id.,* at 272. Accordingly, the Court indicated that the standard of a knowing and intelligent waiver must be applied to test the waiver of counsel at such a lineup. See *United States* v. *Wade, supra,* at 237. The Court stressed the necessary interrelationship between the presence of counsel at a post-indictment lineup before trial and the protection of the trial process itself:

> "Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him. *Pointer* v. *Texas,* 380 U. S. 400. And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself. The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the

> witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness—'that's the man.'" *Id.*, at 235–236.

And in *Miranda* v. *Arizona*, 384 U. S. 436, the Court found that *custodial* interrogation by the police was inherently coercive, and consequently held that detailed warnings were required to protect the privilege against compulsory self-incrimination. The Court made it clear that the basis for decision was the need to protect the fairness of the trial itself:

> "That counsel is present when statements are taken from an individual during interrogation obviously enhances the integrity of the fact-finding processes in court. The presence of an attorney, and the warnings delivered to the individual, enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process. Without the protections flowing from adequate warnings and the rights of counsel, 'all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.'" *Id.*, at 466.

The standards of *Johnson* were, therefore, found to be a necessary prerequisite to a finding of a valid waiver. See 384 U. S., at 475–479. Cf. *Escobedo* v. *Illinois*, 378 U. S., at 490 n. 14.[29]

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[29] As we have already noted, *supra*, at 232, *Miranda* itself involved interrogation of a suspect detained in custody and did not

There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing, either in the purposes behind requiring a "knowing" and "intelligent" waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures.

A strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial. Any trial conducted in derogation of that model leaves open the possibility that the trial reached an unfair result precisely because all the protections specified in the Constitution were not provided. A prime example is the right to counsel. For without that right, a wholly innocent accused faces the real and substantial danger that simply because of his lack of legal expertise he may be convicted. As Mr. Justice Harlan once wrote: "The sound reason why [the right to counsel] is so freely extended for a criminal trial is the severe injustice risked by confronting an untrained defendant with a range of technical points of law, evidence, and tactics familiar to the prosecutor but not to

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concern the investigatory procedures of the police in general on-the-scene questioning. 384 U. S., at 477.

By the same token, the present case does not require a determination of the proper standard to be applied in assessing the validity of a search authorized solely by an alleged consent that is obtained from a person after he has been placed in custody. We do note, however, that other courts have been particularly sensitive to the heightened possibilities for coercion when the "consent" to a search was given by a person in custody. See, *e. g.*, *Judd* v. *United States*, 89 U. S. App. D. C. 64, 66, 190 F. 2d 649, 651; *Channel* v. *United States*, 285 F. 2d 217; *Villano* v. *United States*, 310 F. 2d 680, 684; *United States* v. *Marrese*, 336 F. 2d 501.

himself." *Miranda* v. *Arizona, supra,* at 514 (dissenting opinion). The Constitution requires that every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections that the Framers thought indispensable to a fair trial.[30]

The protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial. Rather, as Mr. Justice Frankfurter's opinion for the Court put it in *Wolf* v. *Colorado,* 338 U. S. 25, 27, the Fourth Amendment protects the "security of one's privacy against arbitrary intrusion by the police . . . ." In declining to apply the exclusionary rule of *Mapp* v. *Ohio,* 367 U. S. 643, to convictions that had become final before rendition of that decision, the Court emphasized that "there is no likelihood of unreliability or coercion present in a search-and-seizure case," *Linkletter* v. *Walker,* 381 U. S. 618, 638. In *Linkletter,* the Court indicated that those cases that had been given retroactive effect went to "the fairness of the trial—the very integrity of the fact-finding process. Here . . . the fairness of the trial is not under attack." *Id.,* at 639. The Fourth Amendment "is not an adjunct to the ascertainment of truth." The guarantees of the Fourth Amendment stand "as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone. To recognize this is no more than to accord those values undiluted respect." *Tehan* v. *United States ex rel. Shott,* 382 U. S. 406, 416.

Nor can it even be said that a search, as opposed to an eventual trial, is somehow "unfair" if a person consents to a search. While the Fourth and Fourteenth

[30] "[In] the uniformly structured situation of the defendant whose case is formally called for plea or trial, where, with everything to be gained by the presence of counsel and no interest deserving con-

Amendments limit the circumstances under which the police can conduct a search, there is nothing constitutionally suspect in a person's voluntarily allowing a search. The actual conduct of the search may be precisely the same as if the police had obtained a warrant. And, unlike those constitutional guarantees that protect a defendant at trial, it cannot be said every reasonable presumption ought to be indulged against voluntary relinquishment. We have only recently stated: "[I]t is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." *Coolidge* v. *New Hampshire,* 403 U. S., at 488. Rather, the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense.

Those cases that have dealt with the application of the *Johnson* v. *Zerbst* rule make clear that it would be next to impossible to apply to a consent search the standard of "an intentional relinquishment or abandonment of a known right or privilege." [31] To be true to *Johnson*

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sideration to be lost, an inflexible rule serves well." Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929, 950.

[31] While we have occasionally referred to a consent search as a "waiver," we have never used that term to mean "an intentional relinquishment or abandonment of a known right or privilege." Hence, for example, in *Johnson* v. *United States,* 333 U. S. 10, this Court found the consent to be ineffective: "Entry to defendant's living quarters, which was the beginning of the search, was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right." *Id.,* at 13. While the Court spoke in terms of "waiver" it arrived at the conclusion that there had been no "waiver" from an analysis of the totality of the objective circumstances—not from the absence of any express indication of Johnson's knowledge

and its progeny, there must be examination into the knowing and understanding nature of the waiver, an examination that was designed for a trial judge in the structured atmosphere of a courtroom. As the Court expressed it in *Johnson:*

> "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." 304 U. S., at 465.[32]

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of a right to refuse or the lack of explicit warnings. See also *Amos* v. *United States,* 255 U. S. 313.

[32] The Court was even more explicit in *Von Moltke* v. *Gillies,* 332 U. S., at 723–724:

"To discharge this duty [of assuring the intelligent nature of the waiver] properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered."

It would be unrealistic to expect that in the informal, unstructured context of a consent search, a policeman, upon pain of tainting the evidence obtained, could make the detailed type of examination demanded by *Johnson*. And, if for this reason a diluted form of "waiver" were found acceptable, that would itself be ample recognition of the fact that there is no universal standard that must be applied in every situation where a person forgoes a constitutional right.[33]

Similarly, a "waiver" approach to consent searches would be thoroughly inconsistent with our decisions that have approved "third party consents." In *Coolidge* v. *New Hampshire*, 403 U. S., at 487–490, where a wife surrendered to the police guns and clothing belonging to her husband, we found nothing constitutionally impermissible in the admission of that evidence at trial since the wife had not been coerced. *Frazier* v. *Cupp*, 394 U. S. 731, 740, held that evidence seized from the defendant's duffel bag in a search authorized by his cousin's consent was admissible at trial. We found that the defendant had assumed the risk that his cousin, with whom he shared the bag, would allow the police to search it. See also *Abel* v. *United States*, 362 U. S. 217. And

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[33] It seems clear that even a limited view of the demands of "an intentional relinquishment or abandonment of a known right or privilege" standard would inevitably lead to a requirement of detailed warnings before any consent search—a requirement all but universally rejected to date. See nn. 13 and 14, *supra*. As the Court stated in *Miranda* with respect to the privilege against compulsory self-incrimination: "[W]e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact." *Miranda* v. *Arizona*, 384 U. S., at 468–469 (footnote omitted). See *United States* v. *Moderacki*, 280 F. Supp. 633; *United States* v. *Blalock*, 255 F. Supp. 268.

in *Hill* v. *California*, 401 U. S. 797, 802–805, we held that the police had validly seized evidence from the petitioner's apartment incident to the arrest of a third party, since the police had probable cause to arrest the petitioner and reasonably, though mistakenly, believed the man they had arrested was he. Yet it is inconceivable that the Constitution could countenance the waiver of a defendant's right to counsel by a third party, or that a waiver could be found because a trial judge reasonably, though mistakenly, believed a defendant had waived his right to plead not guilty.[34]

In short, there is nothing in the purposes or application of the waiver requirements of *Johnson* v. *Zerbst* that justifies, much less compels, the easy equation of a knowing waiver with a consent search. To make such an equation is to generalize from the broad rhetoric of some of our decisions, and to ignore the substance of the differing constitutional guarantees. We decline to follow what one judicial scholar has termed "the domino method of constitutional adjudication . . . wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation." [35]

D

Much of what has already been said disposes of the argument that the Court's decision in the *Miranda* case requires the conclusion that knowledge of a right to refuse is an indispensable element of a valid consent. The considerations that informed the Court's holding in *Miranda* are simply inapplicable in the present case.

[34] Our decision today is, of course, concerned with what constitutes a valid consent, not who can consent. But, the constitutional validity of third-party consents demonstrates the fundamentally different nature of a consent search from the waiver of a trial right.

[35] Friendly, *supra*, n. 30, at 950.

In *Miranda* the Court found that the techniques of police questioning and the nature of custodial surroundings produce an inherently coercive situation. The Court concluded that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." 384 U. S., at 458. And at another point the Court noted that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.*, at 467.

In this case, there is no evidence of any inherently coercive tactics—either from the nature of the police questioning or the environment in which it took place. Indeed, since consent searches will normally occur on a person's own familiar territory, the specter of incommunicado police interrogation in some remote station house is simply inapposite.[36] There is no reason to believe, under circumstances such as are present here, that the response to a policeman's question is presumptively coerced; and there is, therefore, no reason to reject the traditional test for determining the voluntariness of a person's response. *Miranda*, of course, did not reach investigative questioning of a person not in custody, which is most directly analogous to the situation of a consent search, and it assuredly did not indicate that such questioning ought to be deemed inherently coercive. See *supra*, at 232.

It is also argued that the failure to require the Government to establish knowledge as a prerequisite to a valid

[36] As noted above, *supra*, n. 29, the present case does not require a determination of what effect custodial conditions might have on a search authorized solely by an alleged consent.

consent, will relegate the Fourth Amendment to the special province of "the sophisticated, the knowledgeable and the privileged." We cannot agree. The traditional definition of voluntariness we accept today has always taken into account evidence of minimal schooling, low intelligence, and the lack of any effective warnings to a person of his rights; and the voluntariness of any statement taken under those conditions has been carefully scrutinized to determine whether it was in fact voluntarily given.[37]

E

Our decision today is a narrow one. We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact

[37] See, *e. g.*, *Clewis* v. *Texas*, 386 U. S. 707; *Culombe* v. *Connecticut*, 367 U. S. 568; *Reck* v. *Pate*, 367 U. S. 433; *Payne* v. *Arkansas*, 356 U. S. 560; *Fikes* v. *Alabama*, 352 U. S. 191; *Harris* v. *South Carolina*, 338 U. S. 68; *Haley* v. *Ohio*, 332 U. S. 596.

MR. JUSTICE WHITE once answered a similar argument:

"The Court may be concerned with a narrower matter: the unknowing defendant who responds to police questioning because he mistakenly believes that he must and that his admissions will not be used against him. . . . The failure to inform an accused that he need not answer and that his answers may be used against him is very relevant indeed to whether the disclosures are compelled. Cases in this Court, to say the least, have never placed a premium on ignorance of constitutional rights. If an accused is told he must answer and does not know better, it would be very doubtful that the resulting admissions could be used against him. When the accused has not been informed of his rights at all the Court characteristically and properly looks very closely at the surrounding circumstances." *Escobedo* v. *Illinois*, 378 U. S. 478, 499 (WHITE, J., dissenting).

to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.[38] Because the California court followed these principles in affirming the respondent's conviction, and because the Court of Appeals for the Ninth Circuit in remanding for an evidentiary hearing required more, its judgment must be reversed.

It is so ordered.

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion and its judgment.

At the time *Kaufman* v. *United States*, 394 U. S. 217 (1969), was decided, I, as a member of the Court of Appeals (but not of its panel) whose order was there reversed, found myself in agreement with the views expressed by Mr. Justice Harlan, writing for himself and my Brother STEWART in dissent. *Id.*, at 242. My attitude has not changed in the four years that have passed since *Kaufman* was decided.

Although I agree with nearly all that MR. JUSTICE POWELL has to say in his detailed and persuasive concurring opinion, *post*, p. 250, I refrain from joining it at this time because, as MR. JUSTICE STEWART'S opinion reveals, it is not necessary to reconsider *Kaufman* in order to decide the present case.

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[38] The State also urges us to hold that a violation of the exclusionary rule may not be raised by a state or federal prisoner in a collateral attack on his conviction, and thus asks us to overturn our contrary holdings in *Kaufman* v. *United States*, 394 U. S. 217; *Whiteley* v. *Warden*, 401 U. S. 560; *Harris* v. *Nelson*, 394 U. S. 286; and *Mancusi* v. *DeForte*, 392 U. S. 364. Since we have found no valid Fourth and Fourteenth Amendment claim in this case, we do not consider that question.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring.

While I join the opinion of the Court, it does not address what seems to me the overriding issue briefed and argued in this case: the extent to which federal habeas corpus should be available to a state prisoner seeking to exclude evidence from an allegedly unlawful search and seizure. I would hold that federal collateral review of a state prisoner's Fourth Amendment claims—claims which rarely bear on innocence—should be confined solely to the question of whether the petitioner was provided a fair opportunity to raise and have adjudicated the question in state courts. In view of the importance of this issue to our system of criminal justice, I think it appropriate to express my views.

I

Although petitions for federal habeas corpus assert a wide variety of constitutional questions, we are concerned in this case only with a Fourth Amendment claim that an unlawful search occurred and that the state court erred in failing to exclude the evidence obtained therefrom. A divided court in *Kaufman* v. *United States*, 394 U. S. 217 (1969), held that collateral review of search-and-seizure claims was appropriate on motions filed by federal prisoners under 28 U. S. C. § 2255. Until *Kaufman*, a substantial majority of the federal courts of appeals had considered that claims of unlawful search and seizure " 'are not proper matters to be presented by a motion to vacate sentence under § 2255 . . . .' " *Id.*, at 220. The rationale of this view was fairly summarized by the Court:

> "The denial of Fourth Amendment protection against unreasonable searches and seizures, the Gov-

> ernment's argument runs, is of a different nature from denials of other constitutional rights which we have held subject to collateral attack by federal prisoners. For unlike a claim of denial of effective counsel or of violation of the privilege against self incrimination, as examples, a claim of illegal search and seizure does not impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable; rather, the exclusion of illegally seized evidence is simply a prophylactic device intended generally to deter Fourth Amendment violations by law enforcement officers." *Id.*, at 224.

In rejecting this rationale, the Court noted that under prior decisions "the federal habeas remedy extends to state prisoners alleging that unconstitutionally obtained evidence was admitted against them at trial," [1] and concluded that there was no basis for restricting "access by federal prisoners with illegal search-and-seizure claims to federal collateral remedies, while placing no similar restriction on access by state prisoners." *Id.*, at 225–226. In short, on petition for habeas corpus or collateral review filed in a federal district court, whether by state prisoners under 28 U. S. C. § 2254 or federal prisoners under § 2255, the present rule is that Fourth Amendment claims may be asserted and the exclusionary rule must be applied in precisely the same manner as on direct review. Neither the history or purpose of habeas corpus, the desired prophylactic utility of the exclusionary rule as applied to Fourth Amendment claims, nor any sound reason relevant to the administration of criminal justice in our federal system justifies such a power.

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[1] Cases cited as examples included *Mancusi* v. *DeForte*, 392 U. S. 364 (1968); *Carafas* v. *LaVallee*, 391 U. S. 234 (1968); *Warden* v. *Hayden*, 387 U. S. 294 (1967).

II

The federal review involved in this Fourth Amendment case goes well beyond the traditional purpose of the writ of habeas corpus. Much of the present perception of habeas corpus stems from a revisionist view of the historic function that writ was meant to perform. The critical historical argument has focused on the nature of the writ at the time of its incorporation in our Constitution and at the time of the Habeas Corpus Act of 1867, the direct ancestor of contemporary habeas corpus statutes.[2] In *Fay* v. *Noia*, 372 U. S. 391, 426 (1963), the Court interpreted the writ's historic position as follows:

> "At the time the privilege of the writ was written into the Federal Constitution it was settled that the writ lay to test any restraint contrary to fundamental law, which in England stemmed ultimately from Magna Charta but in this country was embodied in the written Constitution. Congress in 1867 sought to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of the federal courts to their constitutional maximum. Obedient to this purpose, we have consistently held that federal court

[2] The Act of Feb. 5, 1867, c. 28, § 1, 14 Stat. 385, provided that "the several courts of the United States . . . within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . . ."

Federal habeas review for those in state custody is now authorized by 28 U. S. C. § 2254 (a):

"The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

> jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings."

If this were a correct interpretation of the relevant history, the present wide scope accorded the writ would have arguable support, despite the impressive reasons to the contrary. But recent scholarship has cast grave doubt on *Fay*'s version of the writ's historic function.

It has been established that both the Framers of the Constitution and the authors of the 1867 Act expected that the scope of habeas corpus would be determined with reference to the writ's historic, common-law development.[3] Mr. Chief Justice Marshall early referred to the common-law conception of the writ in determining its constitutional and statutory scope, *Ex parte Bollman*, 4 Cranch 75, 93–94 (1807); *Ex parte Watkins*, 3 Pet. 193, 201–202 (1830), and Professor Oaks has noted that "when the 1867 Congress provided that persons restrained of their liberty in violation of the Constitution could obtain a writ of habeas corpus from a federal court, it undoubtedly intended—except to the extent the legislation provided otherwise—to incorporate the common-law uses and functions of this remedy."[4]

It thus becomes important to understand exactly what was the common-law scope of the writ both when embraced by our Constitution and incorporated into the Habeas Corpus Act of 1867. Two respected scholars have recently explored precisely these questions.[5] Their efforts

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[3] Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 466 (1963); Oaks, Legal History in the High Court—Habeas Corpus, 64 Mich. L. Rev. 451, 451–456 (1966).

[4] Oaks, *supra*, n. 3, at 452.

[5] Professor Paul M. Bator of Harvard Law School and Professor Dallin H. Oaks formerly of the University of Chicago School of Law. Citations to the relevant articles are in n. 3, *supra*.

have been both meticulous and revealing. Their conclusions differ significantly from those of the Court in *Fay* v. *Noia*, that habeas corpus traditionally has been available "to remedy any kind of governmental restraint contrary to fundamental law." 372 U. S., at 405.

The considerable evidence marshaled by these scholars need not be restated here. Professor Oaks makes a convincing case that under the common law of habeas corpus at the time of the adoption of the Constitution, "once a person had been convicted by a superior court of general jurisdiction, a court disposing of a habeas corpus petition could not go behind the conviction for any purpose other than to verify the formal jurisdiction of the committing court." [6] Certainly that was what Mr. Chief Justice Marshall understood when he stated:

> "This writ [habeas corpus] is, as has been said, in the nature of a writ of error which brings up the body of the prisoner with the cause of commitment. The court can undoubtedly inquire into the sufficiency of that cause; but if it be the judgment of a court of competent jurisdiction, especially a judgment withdrawn by law from the revision of this court, is not that judgment in itself sufficient cause? Can the court, upon this writ, look beyond the judgment, and re-examine the charges on which it was rendered. A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it." *Ex parte Watkins*, 3 Pet., at 202–203.

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[6] Oaks, *supra*, n. 3, at 468.

The respect shown under common law for the finality of the judgment of a committing court at the time of the Constitution and in the early 19th century did not, of course, explicitly contemplate the operation of habeas corpus in the context of federal-state relations. Federal habeas review for state prisoners was not available until passage of the Habeas Corpus Act of 1867. Yet there is no evidence that Congress intended that Act to jettison the respect theretofore shown by a reviewing court for prior judgments by a court of proper jurisdiction. The Act "received only the most perfunctory attention and consideration in the Congress; indeed, there were complaints that its effects could not be understood at all." [7] In fact, as Professor Bator notes, it would require overwhelming evidence, which simply is not present, to conclude that the 1867 Congress intended "to tear habeas corpus entirely out of the context of its historical meaning and scope and convert it into an ordinary writ of error with respect to all federal questions in all criminal cases." [8] Rather, the House Judiciary Committee when it reviewed the Act in 1884 understood that it was not "contemplated by its framers or . . . properly . . . construed to authorize the overthrow of the final judgments of the State courts of general jurisdiction, by the inferior Federal judges. . . ." [9]

Much, of course, has transpired since that first Habeas Corpus Act. See *Fay* v. *Noia*, 372 U. S., at 449–463 (Harlan, J., dissenting). The scope of federal habeas corpus for state prisoners has evolved from a quite limited inquiry into whether the committing state court had jurisdiction, *Andrews* v. *Swartz*, 156 U. S. 272 (1895); *In re*

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[7] Bator, *supra*, n. 3, at 475–476.

[8] *Id.*, at 475.

[9] H. R. Rep. No. 730, 48th Cong., 1st Sess., 5 (1884), quoted in Bator, *supra*, n. 3, at 477.

Moran, 203 U. S. 96 (1906), to whether the applicant had been given an adequate opportunity in state court to raise his constitutional claims, *Frank* v. *Mangum*, 237 U. S. 309 (1915); and finally to actual redetermination in federal court of state court rulings on a wide variety of constitutional contentions, *Brown* v. *Allen*, 344 U. S. 443 (1953). No one would now suggest that this Court be imprisoned by every particular of habeas corpus as it existed in the late 18th and 19th centuries. But recognition of that reality does not liberate us from all historical restraint. The historical evidence demonstrates that the purposes of the writ, at the time of the adoption of the Constitution, were tempered by a due regard for the finality of the judgment of the committing court. This regard was maintained substantially intact when Congress, in the Habeas Corpus Act of 1867, first extended federal habeas review to the delicate interrelations of our dual court systems.

III

Recent decisions, however, have tended to depreciate the importance of the finality of prior judgments in criminal cases. *Kaufman*, 394 U. S., at 228; *Sanders* v. *United States*, 373 U. S. 1, 8 (1963); *Fay*, *supra*, at 424. This trend may be a justifiable evolution of the use of habeas corpus where the one in state custody raises a constitutional claim bearing on his innocence. But the justification for disregarding the historic scope and function of the writ is measurably less apparent in the typical Fourth Amendment claim asserted on collateral attack. In this latter case, a convicted defendant is most often asking society to redetermine a matter with no bearing at all on the basic justice of his incarceration.

Habeas corpus indeed *should* provide the added assurance for a free society that no innocent man suffers an unconstitutional loss of liberty. The Court in *Fay* described

habeas corpus as a remedy for "whatever society deems to be intolerable restraints," and recognized that those to whom the writ should be granted "are persons whom society has grievously wronged and for whom belated liberation is little enough compensation." *Id.*, at 401–402, 441. The Court there acknowledged that the central reason for the writ lay in remedying injustice to the individual. Recent commentators have recognized the same core concept, one noting that "where *personal liberty* is involved, a democratic society . . . insists that it is less important to reach an unshakable decision than to *do justice* (emphasis added)," [10] and another extolling the use of the writ in *Leyra* v. *Denno,* 347 U. S. 556 (1954), with the assertion that "[b]ut for federal habeas corpus, these two men would have gone to their deaths for crimes of which they were found not guilty." [11]

I am aware that history reveals no exact tie of the writ of habeas corpus to a constitutional claim relating to innocence or guilt. Traditionally, the writ was unavailable even for many constitutional pleas grounded on a claimant's innocence, while many contemporary proponents of expanded employment of the writ would permit its issuance for one whose deserved confinement was never in doubt. We are now faced, however, with the task of accommodating the historic respect for the finality of the judgment of a committing court with recent Court expansions of the role of the writ. This accommodation can best be achieved, with due regard to all of the values implicated, by recourse to the central reason for habeas corpus: the affording of means,

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[10] Pollak, Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ, 66 Yale L. J. 50, 65 (1956).

[11] Reitz, Federal Habeas Corpus: Postconviction Remedy for State Prisoners, 108 U. Pa. L. Rev. 461, 497 (1960).

through an extraordinary writ, of redressing an *unjust* incarceration.

Federal habeas review of search and seizure claims is rarely relevant to this reason. Prisoners raising Fourth Amendment claims collaterally usually are quite *justly* detained. The evidence obtained from searches and seizures is often "the clearest proof of guilt" with a very high content of reliability.[12] Rarely is there any contention that the search rendered the evidence unreliable or that its means cast doubt upon the prisoner's guilt. The words of Mr. Justice Black drive home the point:

> "A claim of illegal search and seizure under the Fourth Amendment is crucially different from many other constitutional rights; ordinarily the evidence seized can in no way have been rendered untrustworthy by the means of its seizure and indeed often this evidence alone establishes beyond virtually any shadow of a doubt that the defendant is guilty." *Kaufman* v. *United States*, 394 U. S., at 237 (1969) (dissenting opinion).

Habeas corpus review of search and seizure claims thus brings a deficiency of our system of criminal justice into sharp focus: a convicted defendant asserting no constitutional claim bearing on innocence and relying solely on an alleged unlawful search, is now entitled to federal habeas review of state conviction and the likelihood of release if the reviewing court concludes that the search was unlawful. That federal courts would actually redetermine constitutional claims bearing no relation to the prisoner's innocence with the possibility of releasing him from custody if the search is held unlawful not only defeats our societal interest in a rational legal system but serves no compensating ends of personal justice.

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[12] Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970).

IV

This unprecedented extension of habeas corpus far beyond its historic bounds and in disregard of the writ's central purpose is an anomaly in our system sought to be justified only by extrinsic reasons which will be addressed in Part V of this opinion. But first let us look at the costs of this anomaly—costs in terms of serious intrusions on other societal values. It is these other values that have been subordinated—not to further justice on behalf of arguably innocent persons but all too often to serve mechanistic rules quite unrelated to justice in a particular case. Nor are these neglected values unimportant to justice in the broadest sense or to our system of Government. They include (i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded.

When raised on federal habeas, a claim generally has been considered by two or more tiers of state courts. It is the solemn duty of these courts, no less than federal ones, to safeguard personal liberties and consider federal claims in accord with federal law. The task which federal courts are asked to perform on habeas is thus most often one that has or should have been done before. The presumption that "if a job can be well done once, it should not be done twice" is sound and one calculated to utilize best "the intellectual, moral, and political resources involved in the legal system." [13]

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[13] Bator, *supra*, n. 3, at 451.

The conventional justifications for extending federal habeas corpus to afford collateral review of state court judgments were summarized in *Kaufman* v. *United States*, 394 U. S. 217, 225–226, as follows:

"[T]he necessity that federal courts have the 'last say' with re-

Those resources are limited but demand on them constantly increases. There is an insistent call on federal courts both in civil actions, many novel and complex, which affect intimately the lives of great numbers of people and in original criminal trials and appeals which deserve our most careful attention.[14] To the extent the federal courts are required to re-examine claims on collat-

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spect to questions of federal law, the inadequacy of state procedures to raise and preserve federal claims, the concern that state judges may be unsympathetic to federally created rights, the institutional constraints on the exercise of this Court's certiorari jurisdiction to review state convictions . . . ."

Each of these justifications has merit in certain situations, although the asserted inadequacy of state procedures and unsympathetic attitude of state judges are far less realistic grounds of concern than in years past. The issue, fundamentally, is one of perspective and a rational balancing. The appropriateness of federal collateral review is evident in many instances. But it hardly follows that, in order to promote the ends of individual justice which are the foremost concerns of the writ, it is necessary to extend the scope of habeas review indiscriminately. This is especially true with respect to federal review of Fourth Amendment claims with the consequent denigration of other important societal values and interests.

[14] Briefly, civil filings in United States district courts increased from 58,293 in 1961 to 96,173 in 1972. Total appeals commenced in the United States courts of appeals advanced from 4,204 in 1961 to 14,535 in 1972. Petitions for federal habeas corpus filed by state prisoners jumped from 1,020 in 1961 to 7,949 in 1972. Though habeas petitions filed by state prisoners did decline from 9,063 in 1970 to 7,949 in 1972, the overall increase from 1,000 at the start of the last decade is formidable. Furthermore, civil rights prisoner petitions under 42 U. S. C. § 1983 increased from 1,072 to 3,348 in the past five years. Some of these challenged the fact and duration of confinement and sought release from prison and must now be brought as actions for habeas corpus, *Preiser* v. *Rodriguez*, 411 U. S. 475 (1973). See 1972 Annual Report of the Director of the Administrative Office of the United States Courts II–5, II–22, II–28–32.

eral attack,[15] they deprive primary litigants of their prompt availability and mature reflection. After all, the resources of our system are finite: their overextension jeopardizes the care and quality essential to fair adjudication.

The present scope of federal habeas corpus also has worked to defeat the interest of society in a rational point of termination for criminal litigation. Professor Amsterdam has identified some of the finality interests at stake in collateral proceedings:

> "They involve (a) duplication of judicial effort; (b) delay in setting the criminal proceeding at rest; (c) inconvenience and possibly danger in transporting a prisoner to the sentencing court for hearing; (d) postponed litigation of fact, hence litigation which will often be less reliable in reproducing the facts (i) respecting the postconviction claim itself, and (ii) respecting the issue of guilt if the collateral attack succeeds in a form which allows retrial. . . ."

He concluded that:

> "[I]n combination, these finality considerations amount to a more or less persuasive argument against the cognizability of any particular collateral

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[15] MR. CHIEF JUSTICE BURGER has illustrated the absurd extent to which relitigation is sometimes allowed:

"In some of these multiple trial and appeal cases [on collateral attack] the accused continued his warfare with society for eight, nine, ten years and more. In one case . . . more than fifty appellate judges reviewed the case on appeals." Address before the Association of the Bar of the City of New York, N. Y. L. J., Feb. 19, 1970, p. 1.

The English courts, "long admired for [their] fair treatment of accused persons," have never so extended habeas corpus. Friendly, *supra*, n. 12, at 145.

> claim, the strength of the argument depending upon the nature of the claim, the manner of its treatment (if any) in the conviction proceedings, and the circumstances under which collateral litigation must be had." [16]

No effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial and that every incarceration is unfounded. At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen.[17]

Nowhere should the merit of this view be more self-evident than in collateral attack on an allegedly unlawful search and seizure, where the petitioner often asks society to *redetermine* a claim with no relationship at all to the justness of his confinement. Professor Amsterdam has noted that "for reasons which are common to all search and seizure claims," he "would hold even a slight finality interest sufficient to deny the collateral remedy." [18] But, in fact, a strong finality interest militates against allow-

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[16] Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. Pa. L. Rev. 378, 383–384 (1964). The article addresses the problem of collateral relief for federal prisoners, but its rationale applies forcefully to federal habeas for state prisoners as well.

[17] Mr. Justice Harlan put it very well:

"Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community." *Sanders* v. *United States*, 373 U. S. 1, 24–25 (1963) (dissenting opinion).

[18] *Supra*, n. 16, at 388.

ing collateral review of search-and-seizure claims. Apart from the duplication of resources inherent in most habeas corpus proceedings, the validity of a search-and-seizure claim frequently hinges on a complex matrix of events which may be difficult indeed for the habeas court to disinter especially where, as often happens, the trial occurred years before the collateral attack and the state record is thinly sketched.[19]

Finally, the present scope of habeas corpus tends to undermine the values inherent in our federal system of government. To the extent that every state criminal judgment is to be subject indefinitely to broad and repetitive federal oversight, we render the actions of state courts a serious disrespect in derogation of the constitutional balance between the two systems.[20] The present expansive scope of federal habeas review has prompted no small friction between state and federal judiciaries. Justice Paul C. Reardon of the Massachusetts Supreme

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[19] The latter occurs for various reasons, namely, failure of the accused to raise the claim at trial, a determination by the state courts that the claim did not merit a hearing, or a recent decision of this Court extending rights of the accused (although, on Fourth Amendment claims, such decisions have seldom been applied retroactively, see, *e. g., Linkletter* v. *Walker,* 381 U. S. 618 (1965)).

[20] The dispersion of power between State and Federal Governments is constitutionally premised, as Mr. Justice Harlan observed:

"[I]t would surely be shallow not to recognize that the structure of our political system accounts no less for the free society we have. Indeed, it was upon the structure of government that the founders primarily focused in writing the Constitution. Out of bitter experience they were suspicious of every form of all-powerful central authority and they sought to assure that such a government would never exist in this country by structuring the federal establishment so as to diffuse power between the executive, legislative, and judicial branches. The diffusion of power between federal and state authority serves the same ends and takes on added significance as the size of the federal bureaucracy continues to grow." Thoughts at a Dedica-

Judicial Court and then President of the National Center for State Courts, in identifying problems between the two systems, noted bluntly that "[t]he first, without question, is the effect of Federal habeas corpus proceedings on State courts." He spoke of the "humiliation of review from the full bench of the highest State appellate court to a single United States District Court judge." Such broad federal habeas powers encourage in his view the "growing denigration of the State courts and their functions in the public mind." [21] In so speaking Justice Reardon echoed the words of Professor Bator:

> "I could imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an in-

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tion: Keeping the Judicial Function in Balance, 49 A. B. A. J. 943, 943–944 (1963).

The Justice recognized that problems of habeas corpus jurisdiction were "of constitutional dimensions going to the heart of the division of judicial powers in a federal system." *Fay* v. *Noia*, 372 U. S. 391, 464 (1963) (dissenting opinion). Nor have such perceptions ever been the product of but a single Justice. As the Court noted in a historic decision on the conflicting realms of state and federal judicial power:

"[T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence." *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78–79 (1938), quoting Mr. Justice Field in *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368, 401 (1893).

[21] Address at the annual dinner of the Section of Judicial Administration, American Bar Association, San Francisco, California, Aug. 14, 1972, pp. 5, 9, and 10.

> discriminate acceptance of the notion that all the shots will always be called by someone else." [22]

In my view, this Court has few more pressing responsibilities than to restore the mutual respect and the balanced sharing of responsibility between the state and federal courts which our tradition and the Constitution itself so wisely contemplate. This can be accomplished without retreat from our inherited insistence that the writ of habeas corpus retain its full vitality as a means of redressing injustice.

This case involves only a relatively narrow aspect of the appropriate reach of habeas corpus. The specific issue before us, and the only one that need be decided at this time, is the extent to which a state prisoner may obtain federal habeas corpus review of a Fourth Amendment claim. Whatever may be formulated as a more comprehensive answer to the important broader issues (whether by clarifying legislation or in subsequent decisions), Mr. Justice Black has suggested what seems to me to be the appropriate threshold requirement in a case of this kind:

> "I would always require that the convicted defendant raise the kind of constitutional claim that casts some shadow of a doubt on his guilt." *Kaufman* v. *United States,* 394 U. S., at 242 (dissenting opinion).

In a perceptive analysis, Judge Henry J. Friendly expressed a similar view. He would draw the line against habeas corpus review in the absence of a "colorable claim of innocence":

> "[W]ith a few important exceptions, convictions should be subject to collateral attack only when

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[22] Bator, *supra,* n. 3, at 451.

> the prisoner supplements his constitutional plea with a colorable claim of innocence." [23]

Where there is no constitutional claim bearing on innocence, the inquiry of the federal court on habeas review of a state prisoner's Fourth Amendment claim should be confined solely to the question whether the defendant was provided a fair opportunity in the state courts to raise and have adjudicated the Fourth Amendment claim. Limiting the scope of habeas review in this manner would reduce the role of the federal courts in determining the merits of constitutional claims with no relation to a petitioner's innocence and contribute to the restoration of recently neglected values to their proper place in our criminal justice system.

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The importance of the values referred to above is not questioned. What, then, is the reason which has prompted this Court in recent decisions to extend habeas corpus to Fourth Amendment claims largely in disregard of its history as well as these values? In addressing Mr. Justice Black's dissenting view that constitutional claims raised collaterally should be relevant to the petitioner's innocence, the majority in *Kaufman* noted:

> "It [Mr. Justice Black's view] brings into question *the propriety of the exclusionary rule itself.* The application of that rule is not made to turn on the

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[23] Friendly, *supra*, n. 12, at 142. Judge Friendly's thesis, as he develops it, would encompass collateral attack broadly both within the federal system and with respect to federal habeas for state prisoners. Subject to the exceptions carefully delineated in his article, Judge Friendly would apply the criterion of a "colorable showing of innocence" to any collateral attack of a conviction, including claims under the Fifth and Sixth as well as the Fourth Amendments. *Id.*, at 151–157. In this case we need not consider anything other than the Fourth Amendment claims.

> existence of a possibility of innocence; rather, exclusion of illegally obtained evidence is deemed necessary to protect the right of all citizens, not merely the citizen on trial, to be secure against unreasonable searches and seizures." 394 U. S., at 229. (Emphasis added.)

The exclusionary rule has occasioned much criticism, largely on grounds that its application permits guilty defendants to go free and law-breaking officers to go unpunished.[24] The oft-asserted reason for the rule is to deter illegal searches and seizures by the police, *Elkins* v. *United States*, 364 U. S. 206, 217 (1960); *Mapp* v. *Ohio*, 367 U. S. 643, 656 (1961); *Linkletter* v. *Walker*, 381 U. S. 618, 636 (1965); *Terry* v. *Ohio*, 392 U. S. 1, 29 (1968).[25]

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[24] See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 411 (BURGER, C. J., dissenting); Paulsen, The Exclusionary Rule and Misconduct by the Police, 52 J. Crim. L. C. & P. S. 255, 256 (1961); see also J. Wilson, Varieties of Police Behavior (1968); 8 J. Wigmore, Evidence § 2184, pp. 51–52 (J. McNaughton ed. 1961), and H. Friendly, Benchmarks 260–261 (1967), suggesting that even at trial the exclusionary rule should be limited to exclusion of "the fruit of activity intentionally or flagrantly illegal." But see Kamisar, Public Safety v. Individual Liberties: Some "Facts" and "Theories," 53 J. Crim. L. C. & P. S. 171, 188–190 (1962), and Kamisar, On the Tactics of Police-Prosecution Oriented Critics of the Courts, 49 Cornell L. Q. 436 (1964).

[25] These expressions antedated the only scholarly empirical research, MR. JUSTICE STEWART having noted in *Elkins* v. *United States*, 364 U. S. 206, 218 (1960), that "[e]mpirical statistics are not available" as to the efficacy of the rule—a situation which continued until Professor Oaks' study. Indeed, in referring to the basis for the exclusionary rule, Professor Oaks noted that it has been supported, not by facts, but by "recourse to polemic, rhetoric, and intuition." Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 755 (1970). See also Burger, Who Will Watch the Watchman?, 14 Am. U. L. Rev. 1 (1964).

I mention the controversy over the exclusionary rule—not to suggest here its total abandonment (certainly not in the absence of

The efficacy of this deterrent function, however, has been brought into serious question by recent empirical research. Whatever the rule's merits on an initial trial and appeal [26]—a question not in issue here—the case for

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some other deterrent to deviant police conduct) but rather to emphasize its precarious and undemonstrated basis, especially when applied to a Fourth Amendment claim on federal habeas review of a state court decision.

[26] The most searching empirical study of the efficacy of the exclusionary rule was made by Professor Oaks, who concluded that "[a]s a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure." *Supra*, n. 25, at 755. Professor Oaks, though recognizing that conclusive data may not yet be available, summarized the results of his study as follows:

"There is no reason to expect the rule to have any direct effect on the overwhelming majority of police conduct that is not meant to result in prosecutions, and there is hardly any evidence that the rule exerts any deterrent effect on the small fraction of law enforcement activity that is aimed at prosecution. What is known about the deterrent effect of sanctions suggests that the exclusionary rule operates under conditions that are extremely unfavorable for deterring the police. The harshest criticism of the rule is that it is ineffective. It is the sole means of enforcing the essential guarantees of freedom from unreasonable arrests and searches and seizures by law enforcement officers, and it is a failure in that vital task.

"The use of the exclusionary rule imposes excessive costs on the criminal justice system. It provides no recompense for the innocent and it frees the guilty. It creates the occasion and incentive for largescale lying by law enforcement officers. It diverts the focus of the criminal prosecution from the guilt or innocence of the defendant to a trial of the police. Only a system with limitless patience with irrationality could tolerate the fact that where there has been one wrong, the defendant's, he will be punished, but where there have been two wrongs, the defendant's and the officer's, both will go free. This would not be an excessive cost for an effective remedy against police misconduct, but it is a prohibitive price to pay for an illusory one." *Id.*, at 755.

Despite a conviction that the exclusionary rule is a "failure," Professor Oaks would not abolish it altogether until there is something to take its place. He recommends "an effective tort remedy against

collateral application of the rule is an anemic one. On collateral attack, the exclusionary rule retains its major liabilities while the asserted benefit of the rule dissolves. For whatever deterrent function the rule may serve when applied on trial and appeal becomes greatly attenuated when, months or years afterward, the claim surfaces for collateral review. The impermissible conduct has long since occurred, and the belated wrist slap of state police by federal courts harms no one but society on whom the convicted criminal is newly released.[27]

Searches and seizures are an opaque area of the law: flagrant Fourth Amendment abuses will rarely escape detection but there is a vast twilight zone with respect to which one Justice has stated that our own "decisions . . . are hardly notable for their predictability," [28] and another has observed that this Court was " 'bifurcating elements too infinitesimal to be split.' " [29] Serious Fourth Amendment infractions can be dealt with by state judges or by this Court on direct review. But the nonfrivolous Fourth Amendment claims that survive for collateral attack are most likely to be in this grey, twilight area, where the law is difficult for courts to apply, let alone for the policeman on the beat to understand. This is

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the offending officer or his employer." He notes that such a "tort remedy would give courts an occasion to rule on the content of constitutional rights (the Canadian example shows how), and it would provide the real consequence needed to give credibility to the guarantee." *Id.*, at 756–757.

[27] "As the exclusionary rule is applied time after time, it seems that its deterrent efficacy at some stage reaches a point of diminishing returns, and beyond that point its continued application is a public nuisance." Amsterdam, *supra*, n. 16, at 389:

[28] *Ker* v. *California*, 374 U. S. 23, 45 (1963) (Harlan, J., concurring in result).

[29] *Coolidge* v. *New Hampshire*, 403 U. S. 443, 493 (1971) (opinion of BURGER, C. J.). THE CHIEF JUSTICE was quoting Mr. Justice Stone of the Minnesota Supreme Court.

precisely the type of case where the deterrent function of the exclusionary rule is least efficacious, and where there is the least justification for freeing a duly convicted defendant.[30]

Our decisions have not encouraged the thought that what may be an appropriate constitutional policy in one context automatically becomes such for all times and all seasons. In *Linkletter* v. *Walker*, 381 U. S., at 629, the Court recognized the compelling practical considerations against retroactive application of the exclusionary rule. Rather than viewing the rule as having eternal constitutional verity, the Court decided to

> "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. We believe that this approach is particularly correct with reference to the Fourth Amendment's prohibitions as to unreasonable searches and seizures." *Id.*, at 629.

Such a pragmatic approach compelled the Court to conclude that the rule's deterrent function would not be advanced by its retrospective application:

> "The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved. . . . Finally, the ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." *Id.*, at 637.

See also *Desist* v. *United States*, 394 U. S. 244 (1969).

The same practical, particularized analysis of the exclusionary rule's necessity also was evident in *Walder* v. *United States*, 347 U. S. 62 (1954), when the Court per-

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[30] Friendly, *supra*, n. 12, at 162–163.

mitted the Government to utilize unlawfully seized evidence to impeach the credibility of a defendant who had first testified broadly in his own defense. The Court held, in effect, that the policies protected by the exclusionary rule were outweighed in this case by the need to prevent perjury and assure the integrity of proceedings at trial. The Court concluded that to apply the exclusionary rule in such circumstances "would be a perversion of the Fourth Amendment." *Id.*, at 65. The judgment in *Walder* revealed most pointedly that the policies behind the exclusionary rule are neither absolute nor all-encompassing, but rather must be weighed and balanced against a competing and more compelling policy, namely the need for effective determination of truth at trial.

In sum: the case for the exclusionary rule varies with the setting in which it is imposed. It makes little sense to extend the *Mapp* exclusionary rule to a federal habeas proceeding where its asserted deterrent effect must be least efficacious, and its obvious harmful consequences persist in full force.

VI

The final inquiry is whether the above position conforms to 28 U. S. C. § 2254 (a) which provides:

> "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

The trend in recent years has witnessed a proliferation of constitutional rights, "a vast expansion of the claims of error in criminal cases for which a resourceful defense lawyer can find a constitutional basis." [31] Federal ha-

[31] Friendly, *supra*, n. 12, at 156.

beas jurisdiction has been extended far beyond anyone's expectation or intendment when the concept of "custody in violation of the Constitution," now in § 2254 (a), first appeared in federal law over a century ago.[32]

Mr. Justice Black was clearly correct in noting that "not every conviction based in part on a denial of a constitutional right is subject to attack by habeas corpus or § 2255 proceedings after a conviction has become final." *Kaufman,* 394 U. S., at 232 (dissenting opinion). No evidence exists that Congress intended every allegation of a constitutional violation to afford an appropriate basis for collateral review: indeed, the latest revisions of the Federal Habeas Corpus statute in 1966 [33] and the enactment of § 2254 (a) came at the time a majority of the courts of appeals held that claims of unlawful search and seizure " 'are not proper matters to be presented by a motion to vacate sentence under § 2255 but can only be properly presented by appeal from the conviction.' " *Id.,* at 220, quoting *Warren* v. *United States,* 311 F. 2d 673, 675 (CA8 1963).[34] Though the precise discussion in *Kaufman* concerned the claims of federal prisoners under § 2255, the then-existing principle of a distinction between review of search-and-seizure claims in direct and collateral proceedings clearly existed.

There is no indication that Congress intended to wipe out this distinction. Indeed, the broad purpose of the 1966 amendments pointed in the opposite direction. The report of the Senate Judiciary Committee notes that:

> "Although only a small number of these [habeas] applications have been found meritorious, the ap-

[32] See Part II, *supra.*

[33] The 1966 revision of the Federal Habeas Corpus statute enacted among other things, the present 28 U. S. C. §§ 2254 (a), (d), (e), and (f).

[34] See *Kaufman, supra,* at 220–221, nn. 3 and 4, for a listing of the respective positions of the courts of appeals.

> plications in their totality have imposed a heavy burden on the Federal courts. . . . The bill seeks to alleviate the unnecessary burden by introducing a greater degree of finality of judgments in habeas corpus proceedings." S. Rep. No. 1797, 89th Cong., 2d Sess., 2 (1966).[35]

The House Report states similarly that:

> "While in only a small number of these applications have the petitioners been successful, they nevertheless have not only imposed an unnecessary burden on the work of the Federal courts but have also greatly interfered with the procedures and processes of the State courts by delaying, in many cases, the proper enforcement of their judgments." H. R. Rep. No. 1892, 89th Cong., 2d Sess., 5 (1966).

This most recent congressional expression on the scope of federal habeas corpus reflected the sentiment, shared alike by judges and legislators, that the writ has overrun its historical banks to inundate the dockets of federal courts and denigrate the role of state courts. Though Congress did not address the precise question at hand, nothing in § 2254 (a), the state of the law at the time of its adoption, or the historical uses of the language "custody in violation of the Constitution" from which § 2254 (a) is derived,[36] compels a holding that rulings of state courts on claims of unlawful search and

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[35] The letter from Circuit Judge Orie L. Phillips, Chairman of the Committee on Habeas Corpus of the Judicial Conference of the United States, which sponsored the 1966 legislation, to the Chairman of the Senate Subcommittee on Improvements in Judicial Machinery also strongly emphasized the necessity of expediting "the determination in Federal courts of nonmeritorious and repetitious applications for the writ by State court prisoners." S. Rep. No. 1797, 89th Cong., 2d Sess., 5 (1966).

[36] See Part II, *supra*.

seizure must be reviewed and redetermined in collateral proceedings.

VII

Perhaps no single development of the criminal law has had consequences so profound as the escalating use, over the past two decades, of federal habeas corpus to reopen and readjudicate state criminal judgments. I have commented in Part IV above on the far-reaching consequences: the burden on the system,[37] in terms of demands on the courts, prosecutors, defense attorneys, and other personnel and facilities; the absence of efficiency and finality in the criminal process, frustrating both the deterrent function of the law and the effectiveness of rehabilitation; the undue subordination of state courts, with the resulting exacerbation of state-federal relations; and the subtle erosion of the doctrine of federalism itself. Perhaps the single most disquieting consequence of open-ended habeas review is reflected in the prescience of Mr. Justice Jackson's warning that "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones." [38]

If these consequences flowed from the safeguarding of constitutional claims of innocence they should, of course, be accepted as a tolerable price to pay for cherished standards of justice at the same time that efforts are pursued to find more rational procedures. Yet, as illustrated by the case before us today, the question on habeas corpus is

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[37] Mr. Justice Jackson, concurring in the result 20 years ago in *Brown* v. *Allen*, 344 U. S. 443, 532 (1953), lamented the "floods of stale, frivolous and repetitious petitions [for federal habeas corpus by state prisoners which] inundate the docket of the lower courts and swell our own." *Id.*, at 536. The inundation which concerned Mr. Justice Jackson consisted of 541 such petitions. In 1971, the latest year for which figures are available, state prisoners alone filed 7,949 petitions for habeas in federal district courts, over 14 times the number filed when Mr. Justice Jackson voiced his misgivings.

[38] *Brown* v. *Allen*, *supra*, at 537.

too rarely whether the prisoner was innocent of the crime for which he was convicted [39] and too frequently whether some evidence of undoubted probative value has been admitted in violation of an exclusionary rule ritualistically applied without due regard to whether it has the slightest likelihood of achieving its avowed prophylactic purpose.

It is this paradox of a system, which so often seems to subordinate substance to form, that increasingly provokes criticism and lack of confidence. Indeed, it is difficult to explain why a system of criminal justice deserves respect which allows repetitive reviews of convictions long since held to have been final at the end of the normal process of trial and appeal where the basis for re-examination is not even that the convicted defendant was innocent. There has been a halo about the "Great Writ" that no one would wish to dim. Yet one must wonder whether the stretching of its use far beyond any justifiable purpose will not in the end weaken rather than strengthen the writ's vitality.

MR. JUSTICE DOUGLAS, dissenting.

I agree with the Court of Appeals that "verbal assent" to a search is not enough, that the fact that consent was given to the search does not imply that the suspect knew that the alternative of a refusal existed. 448 F. 2d 699, 700. As that court stated:

> "[U]nder many circumstances a reasonable person might read an officer's 'May I' as the courteous ex-

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[39] Commenting on this distortion of our criminal justice system, Justice Walter Schaefer of the Illinois Supreme Court has said: "What bothers me is that almost never do we have a genuine issue of guilt or innocence today. The system has so changed that what we are doing in the courtroom is trying the conduct of the police and that of the prosecutor all along the line." Address before Center for the Study of Democratic Institutions, June 1968, cited by Friendly, *supra*, n. 12, at 145 n. 12.

pression of a demand backed by force of law." *Id.*, at 701.

A considerable constitutional guarantee rides on this narrow issue. At the time of the search there was no probable cause to believe that the car contained contraband or other unlawful articles. The car was stopped only because a headlight and the license plate light were burned out. The car belonged to Alcala's brother, from whom it was borrowed, and Alcala had a driver's license. Traffic citations were appropriately issued. The car was searched, the present record showing that Alcala consented. But whether Alcala knew he had the right to refuse, we do not know. All the Court of Appeals did was to remand the case to the District Court for a finding—and if necessary, a hearing on that issue.

I would let the case go forward on that basis. The long, time-consuming contest in this Court might well wash out. At least we could be assured that, if it came back, we would not be rendering an advisory opinion. Had I voted to grant this petition, I would suggest we dismiss it as improvidently granted. But, being in the minority, I am bound by the Rule of Four.

MR. JUSTICE BRENNAN, dissenting.

The Fourth Amendment specifically guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." We have consistently held that governmental searches conducted pursuant to a validly obtained warrant or reasonably incident to a valid arrest do not violate this guarantee. Here, however, as the Court itself recognizes, no search warrant was obtained and the State does not even suggest "that there was probable cause to search the vehicle or that the search was incident to a valid arrest of any of the occupants." *Ante*,

at 227–228. As a result, the search of the vehicle can be justified solely on the ground that the owner's brother gave his consent—that is, that he waived his Fourth Amendment right "to be secure" against an otherwise "unreasonable" search. The Court holds today that an individual can effectively waive this right even though he is totally ignorant of the fact that, in the absence of his consent, such invasions of his privacy would be constitutionally prohibited. It wholly escapes me how our citizens can meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence. In my view, the Court's conclusion is supported neither by "linguistics," nor by "epistemology," nor, indeed, by "common sense." I respectfully dissent.

MR. JUSTICE MARSHALL, dissenting.

Several years ago, MR. JUSTICE STEWART reminded us that "[t]he Constitution guarantees . . . a society of free choice. Such a society presupposes the capacity of its members to choose." *Ginsberg* v. *New York,* 390 U. S. 629, 649 (1968) (concurring in result). I would have thought that the capacity to choose necessarily depends upon knowledge that there is a choice to be made. But today the Court reaches the curious result that one can choose to relinquish a constitutional right—the right to be free of unreasonable searches—without knowing that he has the alternative of refusing to accede to a police request to search.[1] I cannot agree, and therefore dissent.

[1] The Court holds that Alcala's consent to search was shown, in the state court proceedings, to be constitutionally valid as a relinquishment of his Fourth Amendment rights. In those proceedings, no evidence was adduced as to Alcala's knowledge of his right to refuse assent. The Court of Appeals for the Ninth Circuit, whose judgment is today reversed, would have required petitioner to pro-

I

I believe that the Court misstates the true issue in this case. That issue is not, as the Court suggests, whether the police overbore Alcala's will in eliciting his consent, but rather, whether a simple statement of assent to search, without more,[2] should be sufficient to permit the police to search and thus act as a relinquishment of Alcala's constitutional right to exclude the police.[3] This Court has always scrutinized with great care claims that a person has forgone the opportunity to assert constitutional rights. See, *e. g.*, *Fuentes* v. *Shevin*, 407 U. S. 67 (1972); *D. H. Overmyer Co.* v. *Frick Co.*, 405 U. S. 174 (1972); *Boykin* v. *Alabama*, 395 U. S. 238 (1969); *Carnley* v. *Cochran*, 369 U. S. 506 (1962). I see no reason to give the claim that a person consented to a search any less rigorous scrutiny. Every case in this Court involving this kind of search has heretofore spoken

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duce such evidence. As discussed *infra*, at 286, the Court of Appeals did not hold that the police must inform a subject of investigation of his right to refuse assent as an essential predicate to their effort to secure consent to search.

[2] The Court concedes that the police lacked probable cause to search. *Ante*, at 227–228. At the time the search was conducted, there were three police vehicles near the car. 270 Cal. App. 2d 648, 651, 76 Cal. Rptr. 17, 19 (1969). Perhaps the police in fact had some reason, not disclosed in this record, to believe that a search would turn up incriminating evidence. But it is also possible that the late hour and the number of men in the car suggested to the first officer on the scene that it would be prudent to wait until other officers had arrived before investigating any further.

[3] Because Bustamonte was charged with possessing stolen checks found in the search at which he was present, he has standing to object to the search even though he claims no possessory or proprietary interest in the car. *Jones* v. *United States*, 362 U. S. 257 (1960). Cf. *People* v. *Ibarra*, 60 Cal. 2d 460, 386 P. 2d 487 (1963); *People* v. *Perez*, 62 Cal. 2d 769, 401 P. 2d 934 (1965).

of consent as a waiver.[4] See, *e. g.*, *Amos* v. *United States*, 255 U. S. 313, 317 (1921); *Zap* v. *United States*, 328 U. S. 624, 628 (1946); *Johnson* v. *United States*, 333 U. S. 10, 13 (1948).[5] Perhaps one skilled in lin-

[4] The Court reads *Davis* v. *United States*, 328 U. S. 582 (1946), as upholding a search like the one in this case on the basis of consent. But it was central to the reasoning of the Court in that case that the items seized were the property of the Government temporarily in Davis' custody. See *id.*, at 587–593. The agents of the Government were thus simply demanding that property to which they had a lawful claim be returned to them. Because of this, the Court held that "permissible limits of persuasion are not so narrow as where *private* papers are sought." *Id.*, at 593. The opinion of the Court therefore explicitly disclaimed stating a general rule for ordinary searches for evidence. That the distinction, for purposes of Fourth Amendment analysis, between mere evidence and contraband or instrumentalities has now been abolished, *Warden* v. *Hayden*, 387 U. S. 294 (1967), is no reason to disregard the fact that when *Davis* was decided, that distinction played an important role in shaping analysis.

In *Zap* v. *United States*, 328 U. S. 624, 628 (1946), the Court held that "when petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he *voluntarily waived* such claim to privacy which he otherwise might have had as respects business documents related to those contracts." (Emphasis added.) Because Zap had signed a contract specifically providing that his records would be open at all time to the Government, he had indeed waived his right to keep those records private. Cf. *United States* v. *Biswell*, 406 U. S. 311 (1972).

[5] Aside from *Zap* and *Davis*, *supra*, n. 4, I have found no cases decided by this Court explicitly upholding a search based on the consent of the defendant. It is hardly surprising, then, that "[t]he approach of the Court of Appeals for the Ninth Circuit finds no support in any of our decisions," *ante*, at 229. But in nearly every case discussing the problem at length, the Court referred to consent as a waiver. And it mischaracterizes those cases to describe them as analyzing the totality of the circumstances, *ante*, at 243 n. 31. See *infra*, at 283–284.

guistics or epistemology can disregard those comments, but I find them hard to ignore.

To begin, it is important to understand that the opinion of the Court is misleading in its treatment of the issue here in three ways. First, it derives its criterion for determining when a verbal statement of assent to search operates as a relinquishment of a person's right to preclude entry from a justification of consent searches that is inconsistent with our treatment in earlier cases of exceptions to the requirements of the Fourth Amendment, and that is not responsive to the unique nature of the consent-search exception. Second, it applies a standard of voluntariness that was developed in a very different context, where the standard was based on policies different from those involved in this case. Third, it mischaracterizes our prior cases involving consent searches.

A

The Court assumes that the issue in this case is: what are the standards by which courts are to determine that consent is voluntarily given? It then imports into the law of search and seizure standards developed to decide entirely different questions about coerced confessions.[6]

The Fifth Amendment, in terms, provides that no person "shall be compelled in any criminal case to be a witness against himself." Nor is the interest protected by the Due Process Clause of the Fourteenth Amendment any different. The inquiry in a case where a confession is challenged as having been elicited in an unconstitutional manner is, therefore, whether the behavior

[6] That this application of the "domino" method of adjudication is misguided is shown, I believe, by the fact that the phrase "voluntary consent" seems redundant in a way that the phrase "voluntary confession" does not.

of the police amounted to compulsion of the defendant.[7] Because of the nature of the right to be free of compulsion, it would be pointless to ask whether a defendant knew of it before he made a statement; no sane person would knowingly relinquish a right to be free of compulsion. Thus, the questions of compulsion and of violation of the right itself are inextricably intertwined. The cases involving coerced confessions, therefore, pass over the question of knowledge of that right as irrelevant, and turn directly to the question of compulsion.

Miranda v. *Arizona*, 384 U. S. 436 (1966), confirms this analysis. There the Court held that certain warnings must be given to suspects prior to their interrogation so that the inherently coercive nature of in-custody questioning would be diminished by the suspect's knowledge that he could remain silent. But, although those warnings, of course, convey information about various rights of the accused, the information is intended only to protect the suspect against acceding to the other coercive aspects of police interrogation. While we would not ordinarily think that a suspect could waive his right to be free of coercion, for example, we do permit suspects to waive the rights they are informed of by police warnings, on the belief that such information in itself sufficiently decreases the chance that a statement would be elicited by compulsion. *Id.*, at 475–476. Thus, nothing the defendant did in the cases involving coerced confessions was taken to operate as a relinquishment of his rights; certainly the fact that the defendant made

[7] The Court used the terms "voluntary" or "involuntary" in such cases as shorthand labels for an assessment of the police behavior in light of the particular characteristics of the individual defendant because behavior that might not be coercive of some individuals might nonetheless compel others to give incriminating statements. See, *e. g.*, *Haley* v. *Ohio*, 332 U. S. 596, 599 (1948); *Stein* v. *New York*, 346 U. S. 156, 185 (1953); *Fikes* v. *Alabama*, 352 U. S. 191 (1957).

a statement was never taken to be a relinquishment of the right to be free of coercion.[8]

B

In contrast, this case deals not with "coercion," but with "consent," a subtly different concept to which different standards have been applied in the past. Freedom from coercion is a substantive right, guaranteed by the Fifth and Fourteenth Amendments. Consent, however, is a mechanism by which substantive requirements, otherwise applicable, are avoided. In the context of the Fourth Amendment, the relevant substantive requirements are that searches be conducted only after evidence justifying them has been submitted to an impartial magistrate for a determination of probable cause. There are, of course, exceptions to these requirements based on a variety of exigent circumstances that make it impractical to invalidate a search simply because the police failed to get a warrant.[9] But none of the exceptions

[8] I, of course, agree with the Court's analysis to the extent that it treats a verbal expression of assent as no true consent when it is elicited through compulsion. *Ante*, at 229. Since, in my view, it is just as unconstitutional to search after coercing consent as it is to search after uninformed consent, I agree with the rationale of *Amos* v. *United States*, 255 U. S. 313 (1921), *Johnson* v. *United States*, 333 U. S. 10 (1948), and *Bumper* v. *North Carolina*, 391 U. S. 543 (1968). That an alternative rationale might have been used in those cases seems to me irrelevant.

[9] See, *e. g.*, *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971); *Chimel* v. *California*, 395 U. S. 752 (1969); *Warden* v. *Hayden*, 387 U. S. 294 (1967).

In *Chimel*, we explained that searches incident to arrest were justified by the need to protect officers from attacks by the persons they have arrested, and by the need to assure that easily destructible evidence in the reach of the suspect will not be destroyed. 395 U. S., at 762–763. And in *Coolidge*, we said that searches of automobiles on the highway are justified because an alerted criminal might easily drive the evidence away while a warrant was sought.

relating to the overriding needs of law enforcement are applicable when a search is justified solely by consent. On the contrary, the needs of law enforcement are significantly more attenuated, for probable cause to search may be lacking but a search permitted if the subject's consent has been obtained. Thus, consent searches are permitted, not because such an exception to the requirements of probable cause and warrant is essential to proper law enforcement, but because we permit our citizens to choose whether or not they wish to exercise their constitutional rights. Our prior decisions simply do not support the view that a meaningful choice has been made solely because no coercion was brought to bear on the subject.

For example, in *Bumper* v. *North Carolina,* 391 U. S. 543 (1968), four law enforcement officers went to the home of Bumper's grandmother. They announced that they had a search warrant, and she permitted them to enter. Subsequently, the prosecutor chose not to rely on the warrant, but attempted to justify the search by the woman's consent. We held that consent could not be established "by showing no more than acquiescence to a claim of lawful authority," *id.,* at 548–549. We did not there inquire into all the circumstances, but focused on a single fact, the claim of authority, even though the grandmother testified that no threats were made. *Id.,* at 547 n. 8. It may be that, on the facts of that case, her consent was under all the circumstances involuntary, but it is plain that we did not apply the test adopted by the Court today. And, whatever the posture of the case when it reached this Court, it could

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403 U. S., at 459–462. In neither situation is police convenience alone a sufficient reason for establishing an exception to the warrant requirement. Yet the Court today seems to say that convenience alone justifies consent searches.

not be said that the police in *Bumper* acted in a threatening or coercive manner, for they did have the warrant they said they had; the decision not to rely on it was made long after the search, when the case came into court.[10]

That case makes it clear that police officers may not courteously order the subject of a search simply to stand aside while the officers carry out a search they have settled on. Yet there would be no coercion or brutality in giving that order. No interests that the Court today recognizes would be damaged in such a search. Thus, all the police must do is conduct what will inevitably be a charade of asking for consent. If they display any firmness at all, a verbal expression of assent will undoubtedly be forthcoming. I cannot believe that the protections of the Constitution mean so little.

II

My approach to the case is straightforward and, to me, obviously required by the notion of consent as a relinquishment of Fourth Amendment rights. I am at a loss to understand why consent "cannot be taken literally to mean a 'knowing' choice." *Ante,* at 224. In fact, I have difficulty in comprehending how a decision made without knowledge of available alternatives can be treated as a choice at all.

If consent to search means that a person has chosen to forgo his right to exclude the police from the place they seek to search, it follows that his consent cannot

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[10] The Court's interpretation of *Johnson* v. *United States,* 333 U. S. 10 (1948), a similar case, is baffling. The Court in *Johnson* did not in fact analyze the totality of the circumstances, as the Court now argues, *ante,* at 243 n. 31; the single fact that the police claimed authority to search when in truth they lacked such authority conclusively established that no valid consent had been given.

be considered a meaningful choice unless he knew that he could in fact exclude the police. The Court appears, however, to reject even the modest proposition that, if the subject of a search convinces the trier of fact that he did not know of his right to refuse assent to a police request for permission to search, the search must be held unconstitutional. For it says only that "knowledge of the right to refuse consent is one factor to be taken into account." *Ante,* at 227. I find this incomprehensible. I can think of no other situation in which we would say that a person agreed to some course of action if he convinced us that he did not know that there was some other course he might have pursued. I would therefore hold, at a minimum, that the prosecution may not rely on a purported consent to search if the subject of the search did not know that he could refuse to give consent. That, I think, is the import of *Bumper* v. *North Carolina, supra.* Where the police claim authority to search yet in fact lack such authority, the subject does not know that he may permissibly refuse them entry, and it is this lack of knowledge that invalidates the consent.

If one accepts this view, the question then is a simple one: must the Government show that the subject knew of his rights, or must the subject show that he lacked such knowledge?

I think that any fair allocation of the burden would require that it be placed on the prosecution. On this question, the Court indulges in what might be called the "straw man" method of adjudication. The Court responds to this suggestion by overinflating the burden. And, when it is suggested that the *prosecution's* burden of proof could be easily satisfied if the police informed the subject of his rights, the Court responds by refusing to require the *police* to make a "detailed" inquiry. *Ante,* at 245. If the Court candidly faced the real

question of allocating the burden of proof, neither of these maneuvers would be available to it.

If the burden is placed on the defendant, all the subject can do is to testify that he did not know of his rights. And I doubt that many trial judges will find for the defendant simply on the basis of that testimony. Precisely because the evidence is very hard to come by, courts have traditionally been reluctant to require a party to prove negatives such as the lack of knowledge. See, *e. g.*, 9 J. Wigmore, Evidence 274 (3d ed. 1940); F. James, Civil Procedure § 7.8 (1965); E. Morgan, Some Problems of Proof Under the Anglo-American System of Litigation 75–76 (1956).

In contrast, there are several ways by which the subject's knowledge of his rights may be shown. The subject may affirmatively demonstrate such knowledge by his responses at the time the search took place, as in *United States* v. *Curiale*, 414 F. 2d 744 (CA2 1969). Where, as in this case, the person giving consent is someone other than the defendant, the prosecution may require him to testify under oath. Denials of knowledge may be disproved by establishing that the subject had, in the recent past, demonstrated his knowledge of his rights, for example, by refusing entry when it was requested by the police. The prior experience or training of the subject might in some cases support an inference that he knew of his right to exclude the police.

The burden on the prosecutor would disappear, of course, if the police, at the time they requested consent to search, also told the subject that he had a right to refuse consent and that his decision to refuse would be respected. The Court's assertions to the contrary notwithstanding, there is nothing impractical about this method of satisfying the prosecution's burden of proof.[11]

[11] The proposition rejected in the cases cited by the Court in nn. 13 and 14, was that, as in *Miranda* v. *Arizona*, 384 U. S. 436 (1966),

It must be emphasized that the decision about informing the subject of his rights would lie with the officers seeking consent. If they believed that providing such information would impede their investigation, they might simply ask for consent, taking the risk that at some later date the prosecutor would be unable to prove that the subject knew of his rights or that some other basis for the search existed.

The Court contends that if an officer paused to inform the subject of his rights, the informality of the exchange would be destroyed. I doubt that a simple statement by an officer of an individual's right to refuse consent would do much to alter the informality of the exchange, except to alert the subject to a fact that he surely is entitled to know. It is not without significance that for many years the agents of the Federal Bureau of Investigation have routinely informed subjects of their right to refuse consent, when they request consent to search. Note, Consent Searches: A Reappraisal After Miranda v. Arizona, 67 Col. L. Rev. 130, 143 n. 75 (1967) (citing letter from J. Edgar Hoover). The reported cases in which the police have informed subjects of their right to refuse consent show, also, that the information can be given without disrupting the casual flow of events. See, *e. g.*, *United States* v. *Miller*, 395 F. 2d 116 (CA7 1968). What evidence there is, then, rather strongly suggests that nothing disastrous would happen if the police, before requesting consent, informed the subject that he had

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a statement to the subject of his rights must be given as an indispensable prerequisite to a request for consent to search. This case does not require us to address that proposition, for all that is involved here is the contention that the prosecution could satisfy the burden of establishing the knowledge of the right to refuse consent by showing that the police advised the subject of a search, that is sought to be justified by consent, of that right.

a right to refuse consent and that his refusal would be respected.[12]

I must conclude, with some reluctance, that when the Court speaks of practicality, what it really is talking of is the continued ability of the police to capitalize on the ignorance of citizens so as to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights. Of course it would be "practical" for the police to ignore the commands of the Fourth Amendment, if by practicality we mean that more criminals will be apprehended, even though the constitutional rights of innocent people also go by the board. But such a practical advantage is achieved only at the cost of permitting the police to disregard the limitations that the Constitution places on their behavior, a cost that a constitutional democracy cannot long absorb.

I find nothing in the opinion of the Court to dispel my belief that, in such a case, as the Court of Appeals for

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[12] The Court's suggestion that it would be "unrealistic" to require the officers to make "the detailed type of examination" involved when a court considers whether a defendant has waived a trial right, *ante*, at 245, deserves little comment. The question before us relates to the inquiry to be made in court when the prosecution seeks to establish that consent was given. I therefore do not address the Court's strained argument that one may waive constitutional rights without making a knowing and intentional choice so long as the rights do not relate to the fairness of a criminal trial. I would suggest, however, that that argument is fundamentally inconsistent with the law of unconstitutional conditions. See, *e. g.*, *Perry* v. *Sindermann*, 408 U. S. 593 (1972); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969); *Sherbert* v. *Verner*, 374 U. S. 398 (1963); *Speiser* v. *Randall*, 357 U. S. 513 (1958). The discussion of *United States* v. *Wade*, 388 U. S. 218 (1967), *ante*, at 239–240, also seems inconsistent with the opinion of MR. JUSTICE STEWART in *Kirby* v. *Illinois*, 406 U. S. 682 (1972). In any event, I do not understand how one can relinquish a right without knowing of its existence, and that is the only issue in this case.

the Ninth Circuit said, "[u]nder many circumstances a reasonable person might read an officer's 'May I' as the courteous expression of a demand backed by force of law." 448 F. 2d, at 701. Most cases, in my view, are akin to *Bumper* v. *North Carolina*, 391 U. S. 543 (1968): consent is ordinarily given as acquiescence in an implicit claim of authority to search. Permitting searches in such circumstances, without any assurance at all that the subject of the search knew that, by his consent, he was relinquishing his constitutional rights, is something that I cannot believe is sanctioned by the Constitution.

III

The proper resolution of this case turns, I believe, on a realistic assessment of the nature of the interchange between citizens and the police, and of the practical import of allocating the burden of proof in one way rather than another. The Court seeks to escape such assessments by escalating its rhetoric to unwarranted heights, but no matter how forceful the adjectives the Court uses, it cannot avoid being judged by how well its image of these interchanges accords with reality. Although the Court says without real elaboration that it "cannot agree," *ante*, at 248, the holding today confines the protection of the Fourth Amendment against searches conducted without probable cause to the sophisticated, the knowledgeable, and, I might add, the few.[13] In the final analysis, the Court now sanctions a game of blindman's buff, in which the police always have the upper hand, for the sake of nothing more than the convenience of

[13] The Court's half-hearted defense, that lack of knowledge is to be "taken into account," rings rather hollow, in light of the apparent import of the opinion that even a subject who proves his lack of knowledge may nonetheless have consented "voluntarily," under the Court's peculiar definition of voluntariness.

the police. But the guarantees of the Fourth Amendment were never intended to shrink before such an ephemeral and changeable interest. The Framers of the Fourth Amendment struck the balance against this sort of convenience and in favor of certain basic civil rights. It is not for this Court to restrike that balance because of its own views of the needs of law enforcement officers. I fear that that is the effect of the Court's decision today.

It is regrettable that the obsession with validating searches like that conducted in this case, so evident in the Court's hyperbole, has obscured the Court's vision of how the Fourth Amendment was designed to govern the relationship between police and citizen in our society. I believe that experience and careful reflection show how narrow and inaccurate that vision is, and I respectfully dissent.

CUPP, PENITENTIARY SUPERINTENDENT *v.* MURPHY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-212. Argued March 20, 1973—Decided May 29, 1973

Over respondent's protest and without a warrant, police in the course of station-house questioning in connection with a murder took samples from the respondent's fingernails and discovered evidence used to convict him. Respondent had come to the station house voluntarily and had not been arrested, although he was detained and there was probable cause to believe that he had committed the murder. In reversing the District Court's denial of habeas corpus, the Court of Appeals concluded that, absent arrest or other exigent circumstances, the search was unconstitutional. *Held:* In view of the station-house detention upon probable cause, the very limited intrusion undertaken to preserve highly evanescent evidence was not violative of the Fourth and Fourteenth Amendments. Pp. 293-296.

461 F. 2d 1006, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a concurring statement, *post*, p. 297. MARSHALL, J., filed a concurring opinion, *post*, p. 297. BLACKMUN, J., filed a concurring opinion, in which BURGER, C. J., joined, *post*, p. 300. POWELL, J., filed a concurring opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 300. DOUGLAS, J., *post*, p. 301, and BRENNAN, J., *post*, p. 305, filed opinions dissenting in part.

Thomas H. Denney, Assistant Attorney General of Oregon, argued the cause for petitioner. With him on the brief were *Lee Johnson,* Attorney General, and *John W. Osborn,* Solicitor General.

Howard R. Lonergan argued the cause and filed a brief for respondent.*

**Alan S. Ganz, Frank Carrington, Ronald E. Sherk,* and *Fred E.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent, Daniel Murphy, was convicted by a jury in an Oregon court of the second-degree murder of his wife. The victim died by strangulation in her home in the city of Portland, and abrasions and lacerations were found on her throat. There was no sign of a break-in or robbery. Word of the murder was sent to the respondent, who was not then living with his wife. Upon receiving the message, Murphy promptly telephoned the Portland police and voluntarily came into Portland for questioning. Shortly after the respondent's arrival at the station house, where he was met by retained counsel, the police noticed a dark spot on the respondent's finger. Suspecting that the spot might be dried blood and knowing that evidence of strangulation is often found under the assailant's fingernails, the police asked Murphy if they could take a sample of scrapings from his fingernails. He refused. Under protest and without a warrant, the police proceeded to take the samples, which turned out to contain traces of skin and blood cells, and fabric from the victim's nightgown. This incriminating evidence was admitted at the trial.

The respondent appealed his conviction, claiming that the fingernail scrapings were the product of an unconstitutional search under the Fourth and Fourteenth Amendments. The Oregon Court of Appeals affirmed the conviction, 2 Ore. App. 251, 465 P. 2d 900, and we denied certiorari, 400 U. S. 944. Murphy then commenced the present action for federal habeas corpus re-

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Inbau filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae* urging reversal.

Melvin L. Wulf, *Burt Neuborne*, and *Joel M. Gora* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

lief. The District Court, in an unreported decision, denied the habeas petition, and the Court of Appeals for the Ninth Circuit reversed, 461 F. 2d 1006. The Court of Appeals assumed the presence of probable cause to search or arrest, but held that in the absence of an arrest or other exigent circumstances, the search was unconstitutional. *Id.*, at 1007. We granted certiorari, 409 U. S. 1036, to consider the constitutional question presented.

The trial court, the Oregon Court of Appeals, and the Federal District Court all agreed that the police had probable cause to arrest the respondent at the time they detained him and scraped his fingernails. As the Oregon Court of Appeals said,

> "At the time the detectives took these scrapings they knew:
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> "The bedroom in which the wife was found dead showed no signs of disturbance, which fact tended to indicate a killer known to the victim rather than to a burglar or other stranger.
>
> "The decedent's son, the only other person in the house that night, did not have fingernails which could have made the lacerations observed on the victim's throat.
>
> "The defendant and his deceased wife had had a stormy marriage and did not get along well.
>
> "The defendant had, in fact, been at his home on the night of the murder. He left and drove back to central Oregon claiming that he did not enter the house or see his wife. He volunteered a great deal of information without being asked, yet expressed no concern or curiosity about his wife's fate." 2 Ore. App., at 259–260, 465 P. 2d, at 904.

The Court of Appeals for the Ninth Circuit did not disagree with the conclusion that the police had probable cause to make an arrest, 461 F. 2d, at 1007, nor do we.

It is also undisputed that the police did not obtain an arrest warrant or formally "arrest" the respondent, as that term is understood under Oregon law.[1] The respondent was detained only long enough to take the fingernail scrapings, and was not formally "arrested" until approximately one month later. Nevertheless, the detention of the respondent against his will constituted a seizure of his person, and the Fourth Amendment guarantee of freedom from "unreasonable searches and seizures" is clearly implicated, cf. *United States* v. *Dionisio*, 410 U. S. 1, *Terry* v. *Ohio*, 392 U. S. 1, 19. As the Court said in *Davis* v. *Mississippi*, 394 U. S. 721, 726–727, "Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.' "

In *Davis*, the Court held that fingerprints obtained during the brief detention of persons seized in a police dragnet procedure, without probable cause, were inadmissible in evidence. Though the Court recognized that fingerprinting "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search," *id.*, at 727, the Court held the station-house detention in that case to be violative of the Fourth and Fourteenth Amendments. "Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention," *id.*, at 726.

The respondent in this case, like Davis, was briefly detained at the station house. Yet here, there was, as three courts have found, probable cause to believe that

[1] Oregon defines arrest as "the taking of a person into custody so that he may be held to answer for a crime." Ore. Rev. Stat. § 133.210.

the respondent had committed the murder. The vice of the detention in *Davis* is therefore absent in the case before us. Cf. *United States* v. *Dionisio, supra.*

The inquiry does not end here, however, because Murphy was subjected to a search as well as a seizure of his person. Unlike the fingerprinting in *Davis,* the voice exemplar obtained in *United States* v. *Dionisio, supra,* or the handwriting exemplar obtained in *United States* v. *Mara,* 410 U. S. 19, the search of the respondent's fingernails went beyond mere "physical characteristics . . . constantly exposed to the public," *United States* v. *Dionisio, supra,* at 14, and constituted the type of "severe, though brief, intrusion upon cherished personal security" that is subject to constitutional scrutiny. *Terry* v. *Ohio, supra,* at 24–25.

We believe this search was constitutionally permissible under the principles of *Chimel* v. *California,* 395 U. S. 752. *Chimel* stands in a long line of cases recognizing an exception to the warrant requirement when a search is incident to a valid arrest. *Id.,* at 755–762. The basis for this exception is that when an arrest is made, it is reasonable for a police officer to expect the arrestee to use any weapons he may have and to attempt to destroy any incriminating evidence then in his possession. *Id.,* at 762–763. The Court recognized in *Chimel* that the scope of a warrantless search must be commensurate with the rationale that excepts the search from the warrant requirement.[2] Thus, a warrantless search incident to arrest, the Court held in *Chimel,* must be limited to the area "into which an arrestee might reach." *Id.,* at 763.

[2] As the Court stated in *Terry* v. *Ohio,* "our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." 392 U. S. 1, 19–20.

Where there is no formal arrest, as in the case before us, a person might well be less hostile to the police and less likely to take conspicuous, immediate steps to destroy incriminating evidence on his person. Since he knows he is going to be released, he might be likely instead to be concerned with diverting attention away from himself. Accordingly, we do not hold that a full *Chimel* search would have been justified in this case without a formal arrest and without a warrant. But the respondent was not subjected to such a search.

At the time Murphy was being detained at the station house, he was obviously aware of the detectives' suspicions. Though he did not have the full warning of official suspicion that a formal arrest provides, Murphy was sufficiently apprised of his suspected role in the crime to motivate him to attempt to destroy what evidence he could without attracting further attention. Testimony at trial indicated that after he refused to consent to the taking of fingernail samples, he put his hands behind his back and appeared to rub them together. He then put his hands in his pockets, and a "metallic sound, such as keys or change rattling" was heard. The rationale of *Chimel*, in these circumstances, justified the police in subjecting him to the very limited search necessary to preserve the highly evanescent evidence they found under his fingernails, cf. *Schmerber* v. *California*, 384 U. S. 757.

On the facts of this case, considering the existence of probable cause, the very limited intrusion undertaken incident to the station house detention, and the ready destructibility of the evidence, we cannot say that this search violated the Fourth and Fourteenth Amendments. Accordingly, the judgment of the Court of Appeals is

Reversed.

MR. JUSTICE WHITE joins the opinion of the Court but does not consider the issue of probable cause to have been decided here or to be foreclosed on remand to the Court of Appeals where it has never been considered.

MR. JUSTICE MARSHALL, concurring.

I join the opinion of my BROTHER STEWART.

Murphy's freedom of movement was unquestionably limited when the police did not acquiesce in his refusal to permit them to take scrapings from his fingernails. But that detention, although a seizure of the person protected by the Fourth Amendment, did not amount to an arrest under Oregon law. See Ore. Rev. Stat. § 133.210. The police, understanding this, did not, for example, take Murphy promptly before a magistrate after this detention, as state law requires after an arrest. *Id.*, § 133.550.[1] As we have said before, however, "It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry* v. *Ohio*, 392 U. S. 1, 16 (1968). See also *id.*, at 19 n. 16, 26; *Sibron* v. *New York*, 392 U. S. 40, 67 (1968).

Murphy argues, however, that the detention was unlawful because the police did not satisfy "the general requirement that the authorization of a judicial officer be obtained in advance of detention," *Davis* v. *Mississippi*, 394 U. S. 721, 728 (1969). See also *Terry* v. *Ohio*,

[1] Thus this case does not require us to determine whether the police were required to obtain a warrant for Murphy's arrest at the relevant time. Cf. *Jones* v. *United States*, 357 U. S. 493, 499–500 (1958); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 477–481 (1971).

supra, at 20. But until the officer saw a dark spot under Murphy's thumbnail, and remembered that he had seen lacerations on the throat of the deceased, he had no reason to detain Murphy for the limited purpose of taking fingernail scrapings. Then, when he brought to Murphy's attention his interest in taking such scrapings, he was dealing with a suspect alerted to the desire of the police to inspect his fingernails. At that point, there was no way to preserve the status quo while a warrant was sought, and there was good reason to believe that Murphy might attempt to alter the status quo unless he were prevented from doing so. The police could not assure the preservation of the evidence simply by placing Murphy under close surveillance, because of the nature of the evidence. And, for purposes of Fourth Amendment analysis, detaining him while a warrant was sought would have been as much a seizure as detaining him while his fingernails were scraped. If the Fourth Amendment permits a stop-and-frisk when the police have specific articulable facts from which they may infer that a person, who they suspect is about to commit a crime, is armed and dangerous, *Terry* v. *Ohio*, *supra*, it also permits detention, where the police have probable cause to arrest,[2] to take fingernail scrapings in the circumstances of this case.[3]

Murphy's argument is, of course, a troublesome one, and, if the police had done more than take fingernail

[2] The Court of Appeals assumed that there was probable cause to arrest, and I proceed on that assumption. I agree with MR. JUSTICE WHITE that the question of probable cause to arrest is open on remand.

[3] MR. JUSTICE DOUGLAS suggests that the taking of fingernail scrapings might violate the Fifth Amendment privilege against self-incrimination. In my view, however, that privilege is confined to situations in which the evidence could be secured by the State only with the defendant's "affirmative cooperation," *United States* v. *Dionisio*, 410 U. S. 1, 31 (1973) (MARSHALL, J., dissenting).

scrapings, I would be inclined to hold the search illegal. For, as a general principle of the law of the Fourth Amendment, the scope of a search must be strictly limited in terms of the circumstances that justify the search. See, *e. g.*, *Terry* v. *Ohio*, *supra*, at 19–20; *Chimel* v. *California*, 395 U. S. 752 (1969). When a person is detained, but not arrested, the detention must be justified by particularized police interests other than a desire to initiate a criminal proceeding against the person they detain. The police therefore cannot do more than investigate the circumstances that occasion the detention. In this case, the police limited their intrusion to precisely the area that led them to restrict Murphy's freedom; he was not searched as extensively as he might have been had an arrest occurred. Indeed, in my view, the Fourth Amendment would have barred a more extensive search, for the police had no reason at all to believe that Murphy had on his person more evidence relating to the crime, or, in light of the fact that this case involved a strangulation, a weapon that he might use at the station house.

I realize that exceptions to the warrant requirement may be established because of "powerful hydraulic pressures . . . that bear heavily on the Court to water down constitutional guarantees," *Terry* v. *Ohio*, *supra*, at 39 (DOUGLAS, J., dissenting), and that those same pressures may lead to later expansion of the exceptions beyond the narrow confines of the cases in which they are established, *Adams* v. *Williams*, 407 U. S. 143, 161–162 (1972) (MARSHALL, J., dissenting). But I cannot say that, in the precise circumstances of this case, the police violated the Fourth Amendment in detaining Murphy for the limited purpose of scraping his fingernails. I emphasize, as does the opinion of the Court, that the search conducted incident to this detention was extremely narrow in scope, and that its scope was tied closely to the reasons justify-

ing the detention. On this understanding, I join the opinion of the Court.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring.

The Court today permits a search for evidence without an arrest but under circumstances where probable cause for an arrest existed, where the officers had reasonable cause to believe that the evidence was on respondent's person, and where that evidence was highly destructible. The Court, however, restricts the permissible quest to "the very limited search necessary to preserve the highly evanescent evidence they found under [respondent's] fingernails."

While I join the Court's opinion, I do so with the understanding that what the Court says here applies only where no arrest has been made. Far different factors, in my view, govern the permissible scope of a search incident to a lawful arrest.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring.

In this case the District Court and the Court of Appeals entertained a habeas corpus attack upon a state court conviction on the ground that the evidence seized in violation of the Fourth Amendment had been wrongly admitted at the state trial. For the reasons set forth in my concurring opinion in *Schneckloth* v. *Bustamonte, ante,* p. 250, I think a claim such as this is properly available in federal habeas corpus only to the extent of ascertaining whether the prisoner was afforded a fair opportunity to raise and have adjudicated the question in state courts. The Court today, however, reaches the merits of the respondent's Fourth Amendment claim, and on the merits I join the Court's opinion.

MR. JUSTICE DOUGLAS, dissenting in part.

I agree with the Court that exigent circumstances existed making it likely that the fingernail scrapings of suspect Murphy might vanish if he were free to move about. The police would therefore have been justified in detaining him while a search warrant was sought from a magistrate. None was sought and the Court now holds there was probable cause to search or arrest, making a warrant unnecessary.

Whether there was or was not probable cause is difficult to determine on this record. It is a question that the Court of Appeals never reached. We should therefore remand to it for a determination of that question.

The question is clouded in my mind because the police did not arrest Murphy until a month later. It is a case not covered by *Chimel* v. *California,* 395 U. S. 752, on which the Court relies, for in *Chimel* an arrest had been made.

As the Court states, Oregon defines arrest as "the taking of a person into custody so that he may be held to answer for a crime." Ore. Rev. Stat. § 133.210. No such arrest was made until a month after Murphy's fingernails were scraped. As we stated in *Johnson* v. *United States,* 333 U. S. 10, 15 n. 5, "State law determines the validity of arrests without warrant." The case is therefore on all fours with *Davis* v. *Mississippi,* 394 U. S. 721, where a suspect was detained for the sole purpose of obtaining fingerprints but at the time the police were not detaining him to charge him with the crime. Like the seizure in this case, *Davis* involved an investigative seizure. In *Davis,* at 727, as in *Terry* v. *Ohio,* 392 U. S. 1, 19, the Court rejected the view that the Fourth Amendment does not limit police conduct "if the officers stop short of something called a 'technical arrest' or a 'full-blown search.' "

The reason why no arrest of Murphy was made on the day his fingernails were scraped creates a nagging doubt that they did not then have probable cause to make an arrest and did not reach that conclusion until a month later. Why was Murphy allowed to roam at will, a free man, for the next month? The evolving pattern of a conspiracy offense might induce the police to turn a suspect loose in order to tail him and see what other suspects could be brought into their net. But no such circumstances were present here.

What the decision made today comes down to, I fear, is that "suspicion" is the basis for a search of the person without a warrant. Yet "probable cause" is the requirement of the Fourth Amendment which is applicable to the States by reason of the Fourteenth Amendment. *Mapp* v. *Ohio,* 367 U. S. 643. Suspicion has never been sufficient for a warrantless search, save for the narrow situation of searches incident to an arrest as was involved in *Chimel.* That exception is designed (see *Schmerber* v. *California,* 384 U. S. 757, 769–770) to protect the officer against assaults through weapons within easy reach of the accused or to save evidence within that narrow zone from destruction. However, this is a case where a warrant might have been sought but was not. It is therefore governed by the rule that the rights of a person "against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way." *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392. No warrant could have been issued by the police, for as we held in *Coolidge* v. *New Hampshire,* 403 U. S. 443, 453, a warrant must be issued by "the neutral and detached magistrate required by the Constitution." And see *Mancusi* v. *DeForte,* 392 U. S. 364, 371. As stated in *Johnson* v. *United States,* 333 U. S., at 14, "When the right of privacy must reasonably yield to the right of search is,

as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." In that case the officers, smelling opium, asked for entrance, which was given. On entry, discovering that the accused was the sole occupant, the police arrested her. "Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do." *Id.*, at 16–17.

It will not do here either. As *Boyd* v. *United States*, 116 U. S. 616, stated, the Fourth Amendment is closely related to the Self-Incrimination Clause of the Fifth.* A warrantless search on suspicion, today sustained, gives the police evidence otherwise protected by the Self-Incrimination Clause of the Fifth Amendment. It was in that regard that the Court in *Boyd* said: "[T]he Fourth and Fifth Amendments run almost into each other." *Id.*, at 630. And that Court went on to say: "For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a

*My Brother MARSHALL says that this privilege is confined to cases where the evidence can be obtained only with the defendant's cooperation. But that extends even the boundaries set by *Schmerber* v. *California*, involving forced giving of blood, 384 U. S. 757, 761, with which my Brother MARSHALL disagrees. *United States* v. *Dionisio*, 410 U. S. 1.

witness against himself. We think it is within the clear intent and meaning of those terms." *Id.*, at 633.

The same can be said of incriminating evidence found under a suspect's fingernails. See *Rochin* v. *California*, 342 U. S. 165. Moreover, the Fourth Amendment guarantees the right of the people to be secure "in their persons." Scraping a man's fingernails is an invasion of that privacy and it is tolerable, constitutionally speaking, only if there is a warrant for a search or seizure issued by a magistrate on a showing of "probable cause" that the suspect had committed the crime. There was time to get a warrant; Murphy could have been detained while one was sought; and that detention would have preserved the perishable evidence the police sought. A suspect on the loose could get rid of it; but a suspect closely detained until a warrant is obtained plainly could not.

Our approval of the shortcut taken to avoid the Fourth and Fifth Amendments may be typical of this age. Erosions of constitutional guarantees usually start slowly, not in dramatic onsets. As stated in *Boyd* "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure." 116 U. S., at 635.

The issue of probable cause should be considered by the Court of Appeals. On the record before us and the arguments based on it I cannot say there was "probable cause" for an arrest and for a search, since the arrest came after a month's delay. The only weight we can put in the scales to turn suspicion into probable cause is Murphy's conviction by a jury based on the illegally obtained evidence. That is but a simple way of making the end justify the means—a principle wholly at war with our constitutionally enshrined adversary system.

MR. JUSTICE BRENNAN, dissenting in part.

Without effecting an arrest, and without first seeking to obtain a search warrant from a magistrate, the police decided to scrape respondent's fingernails for destructible evidence. In upholding this search, the Court engrafts another, albeit limited, exception on the warrant requirement. Before we take the serious step of legitimating even limited searches merely upon probable cause—without a warrant or as incident to an arrest—we ought first be certain that such probable cause in fact existed. Here, as my Brother DOUGLAS convincingly demonstrates "[w]hether there was or was not probable cause is difficult to determine on this record." *Ante*, at 301. And, since the Court of Appeals did not consider that question, the proper course would be to remand to that court so that it might decide in the first instance whether there was probable cause to arrest or search. There is simply no need for this Court to decide, upon a disputed record and at this stage of the litigation, whether the instant search would be permissible if probable cause existed.

DOE ET AL. *v.* McMILLAN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71–6356. Argued December 13, 1972—Decided May 29, 1973

Petitioners, parents of District of Columbia (D. C.) school children, brought this action seeking damages and declaratory and injunctive relief for invasion of privacy that they claimed resulted from the dissemination of a congressional report on the D. C. school system that included identification of students in derogatory contexts. The named defendants included members of a House committee, Committee employees, a Committee investigator, and a consultant; the Public Printer and the Superintendent of Documents; and officials and employees connected with the school system. The Court of Appeals affirmed the District Court's dismissal of the complaint on the grounds that the first two categories of defendants were immune by reason of the Speech or Debate Clause, and that the D. C. officials and the legislative employees were protected by the official immunity doctrine recognized in *Barr* v. *Matteo*, 360 U. S. 564. *Held:*

1. The congressional committee members, members of their staff, the consultant, and the investigator are absolutely immune under the Speech or Debate Clause insofar as they engaged in the legislative acts of compiling the report, referring it to the House, or voting for its publication. Pp. 311–313.

2. The Clause does not afford absolute immunity from private suit to persons who, with authorization from Congress, perform the function, which is not part of the legislative process, of publicly distributing materials that allegedly infringe upon the rights of individuals. The Court of Appeals, therefore, erred in holding that respondents who (except for the Committee members and personnel) were charged with such public distribution were protected by the Clause. Pp. 313–318.

3. The Public Printer and the Superintendent of Documents are protected by the doctrine of official immunity enunciated in *Barr* v. *Matteo, supra,* for publishing and distributing the report only to the extent that they served legitimate legislative functions in doing so, and the Court of Appeals erred in holding that their immunity extended beyond that limit. Pp. 318–324.

148 U. S. App. D. C. 280, 459 F. 2d 1304, reversed in part, affirmed in part, and remanded.

WHITE, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, MARSHALL, and POWELL, JJ., joined. DOUGLAS, J., filed a concurring opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 325. BURGER, C. J., filed an opinion concurring in part and dissenting in part, *post*, p. 331. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., joined, *post*, p. 332. REHNQUIST, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., and BLACKMUN, J., joined, and in Part I of which STEWART, J., joined, *post*, p. 338.

Michael J. Valder argued the cause for petitioners. With him on the brief was *Jean Camper Cahn.*

Fred M. Vinson, Jr., and *William C. Cramer* argued the cause for the Legislative respondents. With them on the brief were *Robert S. Erdahl, James S. Rubin, Richard M. Haber, Benton L. Becker,* and *Walter C. DeVaughn. David P. Sutton* argued the cause for the District of Columbia respondents. With him on the brief were *C. Francis Murphy* and *Richard W. Barton.*

MR. JUSTICE WHITE delivered the opinion of the Court.

This case concerns the scope of congressional immunity under the Speech or Debate Clause of the United States Constitution, Art. I, § 6, cl. 1, as well as the reach of official immunity in the legislative context. See *Barr* v. *Matteo,* 360 U. S. 564 (1959); *Tenney* v. *Brandhove,* 341 U. S. 367 (1951).

By resolution adopted February 5, 1969, H. Res. 76, 91st Cong., 1st Sess., 115 Cong. Rec. 2784, the House of Representatives authorized the Committee on the District of Columbia or its subcommittee "to conduct a full and complete investigation and study of . . . the organi-

zation, management, operation, and administration" of any department or agency of the government of the District of Columbia or of any independent agency or instrumentality of government operating solely within the District of Columbia. The Committee was given subpoena power and was directed to "report to the House as soon as practicable . . . the results of its investigation and study together with such recommendations as it deems advisable." On December 8, 1970, a Special Select Subcommittee of the Committee on the District of Columbia submitted to the Speaker of the House a report, H. R. Rep. No. 91–1681 (1970), represented to be a summary of the Subcommittee's investigation and hearings devoted to the public school system of the District of Columbia. On the same day, the report was referred to the Committee of the Whole House on the State of the Union and was ordered printed. 116 Cong. Rec. 40311 (1970). Thereafter, the report was printed and distributed by the Government Printing Office pursuant to 44 U. S. C. §§ 501 and 701.

The 450-page report included among its supporting data some 45 pages that are the gravamen of petitioners' suit. Included in the pertinent pages were copies of absence sheets, lists of absentees, copies of test papers, and documents relating to disciplinary problems of certain specifically named students.[1] The report stated that these materials were included to "give a realistic view" of a troubled school and "the lack of administra-

[1] The Court of Appeals' opinion terms the materials "somewhat derogatory." The absentee lists named students who were frequent "class cutters." Of the 29 test papers published in the report, 21 bore failing grades; all included the name of the student being tested. The letters, memoranda, and other documents relating to disciplinary problems detailed conduct of specifically named students. Some of the deviant conduct described involved sexual perversion and criminal violations.

tive efforts to rectify the multitudinous problems there," to show the level of reading ability of seventh graders who were given a fifth-grade history test, and to illustrate suspension and disciplinary problems.[2]

On January 8, 1971, petitioners, under pseudonyms, brought an action in the United States District Court for the District of Columbia on behalf of themselves, their children, and all other children and parents similarly situated. The named defendants were (1) the Chairman and members of the House Committee on the District of Columbia; (2) the Clerk, Staff Director, and Counsel of the Committee; (3) a consultant and an investigator for the Committee; (4) the Superintendent of Documents and the Public Printer; (5) the President and members of the Board of Education of the District of Columbia; (6) the Superintendent of Public Schools of the District of Columbia; (7) the principal of Jefferson Junior High School and one of the teachers at that school; and (8) the United States of America.

Petitioners alleged that, by disclosing, disseminating, and publishing the information contained in the report, the defendants had violated the petitioners' and their children's statutory, constitutional, and common-law rights to privacy and that such publication had caused and would cause grave damage to the children's mental and physical health and to their reputations, good names, and future careers. Petitioners also alleged various violations of local law. Petitioners further charged that "unless restrained, defendants will continue to distribute and publish information concerning plaintiffs, their children and other students." The complaint prayed for an order enjoining the defendants from further publication, dissemination, and distribution of any report con-

[2] The information was obtained voluntarily from District of Columbia school personnel by Committee investigators.

taining the objectionable material and for an order recalling the reports to the extent practicable and deleting the objectionable material from the reports already in circulation. Petitioners also asked for compensatory and punitive damages.[3]

The District Court, after a hearing on motions for a temporary restraining order and for an order against further distribution of the report, dismissed the action against the individual defendants on the ground that the conduct complained of was absolutely privileged.[4] A divided panel of the United States Court of Appeals for the District of Columbia Circuit affirmed. Without determining whether the complaint stated a cause of action under the Constitution or any applicable law, the majority held that the Members of Congress, the Committee staff employees, and the Public Printer and Superintendent of Documents were immune from the liability asserted against them because of the Speech or Debate Clause and that the official immunity doctrine recognized in *Barr* v. *Matteo, supra,* barred any liability on the part of the District of Columbia officials as well as the legislative employees.[5] We granted certiorari, 408 U. S. 922.

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[3] The prayer also included a request for an injunction prohibiting future disclosure of "confidential information" and requiring the District of Columbia School Board "to establish rules and regulations regarding the confidentiality of school papers and the right of privacy of students in the schools of the District of Columbia."

[4] The District Court also dismissed the suit against the United States for failure to exhaust administrative remedies. 28 U. S. C. § 2675 (a). That ruling is not challenged here.

[5] The Court of Appeals also independently found that injunctive relief would not issue because of assurances from the federal defendants that no republication or further distribution of the report was contemplated. With respect to petitioners' request for injunctive relief against the District of Columbia officials, the Court found that, because of the adoption of new policies concerning confidential information, "there is no substantial threat of future injury to appellants."

I

To "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary," *Gravel* v. *United States,* 408 U. S. 606, 617 (1972), Art. I, § 6, cl. 1, of the Constitution provides that "for any Speech or Debate in either House, they [Members of Congress] shall not be questioned in any other Place."

> "The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process." *Id.,* at 616.[6]

The Speech or Debate Clause has been read "broadly to effectuate its purposes," *United States* v. *Johnson,* 383 U. S. 169, 180 (1966); *Gravel* v. *United States, supra,* at 624, and includes within its protections anything "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson,* 103 U. S. 168, 204 (1881); *United States* v. *Johnson, supra,* at 179; *Gravel* v. *United States, supra,* at 624; *Powell* v. *McCormack,* 395 U. S. 486, 502 (1969); *United States* v. *Brewster,* 408 U. S. 501, 509, 512–513 (1972). Thus "voting by Members and committee reports are protected" and "a Member's conduct at legislative committee hearings, although subject to judicial review in various circumstances, as is legislation itself,

[6] "Our speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government." *United States* v. *Brewster,* 408 U. S. 501, 508 (1972).

may not be made the basis for a civil or criminal judgment against a Member because that conduct is within the 'sphere of legitimate legislative activity.'" *Gravel* v. *United States, supra,* at 624.

Without belaboring the matter further, it is plain to us that the complaint in this case was barred by the Speech or Debate Clause insofar as it sought relief from the Congressmen-Committee members, from the Committee staff, from the consultant, or from the investigator, for introducing material at Committee hearings that identified particular individuals, for referring the report that included the material to the Speaker of the House, and for voting for publication of the report. Doubtless, also, a published report may, without losing Speech or Debate Clause protection, be distributed to and used for legislative purposes by Members of Congress, congressional committees, and institutional or individual legislative functionaries. At least in these respects, the actions upon which petitioners sought to predicate liability were "legislative acts," *Gravel* v. *United States, supra,* at 618, and, as such, were immune from suit.[7]

Petitioners argue that including in the record of the hearings and in the report itself materials describing particular conduct on the part of identified children was actionable because unnecessary and irrelevant to any legislative purpose. Cases in this Court, however, from *Kilbourn* to *Gravel* pretermit the imposition of liability on any such theory. Congressmen and their aides are immune from liability for their actions within the "legislative sphere," *Gravel* v. *United States, supra,* at 624–625, even though their conduct, if performed in other than

[7] In *Gravel,* we held that "the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." *Gravel* v. *United States,* 408 U. S. 606, 618 (1972).

legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes. Although we might disagree with the Committee as to whether it was necessary, or even remotely useful, to include the names of individual children in the evidence submitted to the Committee and in the Committee Report, we have no authority to oversee the judgment of the Committee in this respect or to impose liability on its Members if we disagree with their legislative judgment. The acts of authorizing an investigation pursuant to which the subject materials were gathered, holding hearings where the materials were presented, preparing a report where they were reproduced, and authorizing the publication and distribution of that report were all "integral part[s] of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Id.*, at 625. As such, the acts were protected by the Speech or Debate Clause.

Our cases make perfectly apparent, however, that everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause. "[T]he Clause has not been extended beyond the legislative sphere," and "[l]egislative acts are not all-encompassing." *Id.*, at 624–625. Members of Congress may frequently be in touch with and seek to influence the Executive Branch of Government, but this conduct "though generally done, is not protected legislative activity." *Id.*, at 625; *United States* v. *Johnson, supra.* Nor does the Speech or Debate Clause protect a private republication of documents introduced and made public at a committee hearing, although the

hearing was unquestionably part of the legislative process. *Gravel* v. *United States, supra.*

The proper scope of our inquiry, therefore, is whether the Speech or Debate Clause affords absolute immunity from private suit to persons who, with authorization from Congress, distribute materials which allegedly infringe upon the rights of individuals. The respondents insist that such public distributions are protected, that the Clause immunizes not only publication for the information and use of Members in the performance of their legislative duties but also must be held to protect "publications to the public through the facilities of Congress." Public dissemination, it is argued, will serve "the important legislative function of informing the public concerning matters pending before Congress . . . ." Brief for Legislative Respondents 27.

We do not doubt the importance of informing the public about the business of Congress. However, the question remains whether the act of doing so, simply because authorized by Congress, must always be considered "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings" with respect to legislative or other matters before the House. *Gravel* v. *United States, supra,* at 625. A Member of Congress may not with impunity publish a libel from the speaker's stand in his home district, and clearly the Speech or Debate Clause would not protect such an act even though the libel was read from an official committee report.[8] The reason is that republishing a libel under such cir-

[8] The republication of a libel, in circumstances where the initial publication is privileged, is generally unprotected. See generally 1 F. Harper & F. James, The Law of Torts § 5.18 (1956); W. Prosser, Torts 766–769 (4th ed. 1971). See also *Gravel* v. *United States,* 408 U. S., at 622–627.

cumstances is not an essential part of the legislative process and is not part of that deliberative process "by which Members participate in committee and House proceedings." *Ibid.* By the same token, others, such as the Superintendent of Documents or the Public Printer or legislative personnel, who participate in distribution of actionable material beyond the reasonable bounds of the legislative task, enjoy no Speech or Debate Clause immunity.

Members of Congress are themselves immune for ordering or voting for a publication going beyond the reasonable requirements of the legislative function, *Kilbourn* v. *Thompson, supra,* but the Speech or Debate Clause no more insulates legislative functionaries carrying out such nonlegislative directives than it protected the Sergeant at Arms in *Kilbourn* v. *Thompson* when, at the direction of the House, he made an arrest that the courts subsequently found to be "without authority." 103 U. S., at 200.[9] See also *Powell* v. *McCormack,* 395 U. S., at 504; cf. *Dombrowski* v. *Eastland,* 387 U. S. 82 (1967). The Clause does not protect "criminal conduct threatening the security of the person or property of others, whether performed at the direction of the Senator in preparation for or in execution of a legislative act or done without his knowledge or direction." *Gravel* v. *United States, supra,* at 622. Neither, we think, does it immunize those who publish and distribute otherwise actionable materials

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[9] "In *Kilbourn,* the Speech or Debate Clause protected House Members who had adopted a resolution authorizing Kilbourn's arrest; that act was clearly legislative in nature. But the resolution was subject to judicial review insofar as its execution impinged on a citizen's rights as it did there. That the House could with impunity order an unconstitutional arrest afforded no protection for those who made the arrest." *Gravel* v. *United States,* 408 U. S., at 618.

beyond the reasonable requirements of the legislative function.[10]

Thus, we cannot accept the proposition that in order to perform its legislative function Congress not only must at times consider and use actionable material but also must be free to disseminate it to the public at large, no matter how injurious to private reputation that material might be. We cannot believe that the purpose of the Clause—"to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary," *Gravel* v. *United States, supra,* at 617; *Powell* v. *McCormack, supra,* at 502; *United States* v. *Johnson,* 383 U. S., at 181—will suffer in the slightest if it is held that those who, at the direction of Congress or otherwise, distribute actionable material to the public at large have no automatic immunity under the Speech or Debate Clause but must respond to private suits to the extent that others must respond in light of the Constitution and applicable laws.[11] To hold other-

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[10] Although, as pointed out by my dissenting Brethren, the acts of Senator Gravel were not ordered or authorized by Congress or a congressional committee, *Gravel* v. *United States,* 408 U. S., at 626, the fact of congressional authorization for the questioned act is not sufficient to insulate the act from judicial scrutiny. In *Powell* v. *McCormack,* 395 U. S. 486 (1969), for instance, we reviewed the acts of House employees "acting pursuant to express orders of the House." *Id.,* at 504. We concluded that "although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their acts." *Ibid.* See also *Kilbourn* v. *Thompson,* 103 U. S. 168 (1881); *Dombrowski* v. *Eastland,* 387 U. S. 82 (1967).

[11] We have no occasion in this case to decide whether or under what circumstances, the Speech or Debate Clause would afford immunity to distributors of allegedly actionable materials from grand jury questioning, criminal charges, or a suit by the executive to restrain distribution, where Congress has authorized the particular public distribution.

wise would be to invite gratuitous injury to citizens for little if any public purpose. We are unwilling to sanction such a result, at least absent more substantial evidence that, in order to perform its legislative function, Congress must not only inform the public about the fundamentals of its business but also must distribute to the public generally materials otherwise actionable under local law.

Contrary to the suggestion of our dissenting Brethren, we cannot accept the proposition that our conclusion, that general, public dissemination of materials otherwise actionable under local law is not protected by the Speech or Debate Clause, will seriously undermine the "informing function" of Congress. To the extent that the Committee report is printed and internally distributed to Members of Congress under the protection of the Speech or Debate Clause, the work of Congress is in no way inhibited. Moreover, the internal distribution is "public" in the sense that materials internally circulated, unless sheltered by specific congressional order, are available for inspection by the press and by the public. We only deal, in the present case, with general, public distribution beyond the halls of Congress and the establishments of its functionaries, and beyond the apparent needs of the "*due* functioning of the [legislative] process." *United States* v. *Brewster,* 408 U. S., at 516.

That the Speech or Debate Clause has finite limits is important for present purposes. The complaint before us alleges that the respondents caused the Committee report "to be distributed to the public," that "distribution of the report continues to the present," and that, "unless restrained, defendants will continue to distribute and publish" damaging information about petitioners and their children. It does not expressly appear from the complaint, nor is it contended in this Court, that either the Members of Congress or the Committee personnel did

anything more than conduct the hearings, prepare the report, and authorize its publication. As we have stated, such acts by those respondents are protected by the Speech or Debate Clause and may not serve as a predicate for a suit. The complaint was therefore properly dismissed as to these respondents. Other respondents, however, are alleged to have carried out a public distribution and to be ready to continue such dissemination.

In response to these latter allegations, the Court of Appeals, after receiving sufficient assurances from the respondents that they had no intention of seeking a republication or carrying out further distribution of the report, concluded that there was no basis for injunctive relief. But this left the question whether any part of the previous publication and public distribution by respondents other than the Members of Congress and Committee personnel went beyond the limits of the legislative immunity provided by the Speech or Debate Clause of the Constitution. Until that question was resolved, the complaint should not have been dismissed on threshold immunity grounds, unless the Court of Appeals was correct in ruling that the action against the other respondents was foreclosed by the doctrine of official immunity, a question to which we now turn.[12]

II

The official immunity doctrine, which "has in large part been of judicial making," *Barr* v. *Matteo,* 360 U. S.,

[12] While an inquiry such as is involved in the present case, because it involves two coordinate branches of Government, must necessarily have separation of powers implications, the separation of powers doctrine has not previously prevented this Court from reviewing the acts of Congress, see, *e. g., Kilbourn* v. *Thompson, supra; Dombrowski* v. *Eastland, supra,* even when the Executive Branch is also involved, see, *e. g., United States* v. *Brewster, supra; Gravel* v. *United States, supra.*

at 569, confers immunity on Government officials of suitable rank for the reason that "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." *Id.*, at 571.[13] The official-immunity doctrine seeks to reconcile two important considerations—

> "[O]n the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities." *Id.*, at 565.

In the *Barr* case, the Court reaffirmed existing immunity law but made it clear that the immunity conferred might not be the same for all officials for all purposes. *Id.*, at 573; see also *Tenney* v. *Brandhove*, 341 U. S., at 378; *Dombrowski* v. *Eastland*, 387 U. S., at 85. Judges, like executive officers with discretionary functions, have been held absolutely immune regardless of their motive or good faith. *Barr* v. *Matteo, supra*, at 569; *Pierson* v. *Ray*, 386 U. S. 547, 553–555 (1967). But policemen and like officials apparently enjoy a more limited privilege. *Id.*, at 555–558. Also, the Court determined in *Barr* that the scope of immunity from

[13] Both before and after *Barr*, official immunity has been held applicable to officials of the Legislative Branch. See *Tenney* v. *Brandhove*, 341 U. S. 367 (1951); *Dombrowski* v. *Eastland*, *supra*.

defamation suits should be determined by the relation of the publication complained of to the duties entrusted to the officer. *Barr* v. *Matteo, supra,* at 573–574; see also the companion case, *Howard* v. *Lyons,* 360 U. S. 593, 597–598 (1959). The scope of immunity has always been tied to the "scope of . . . authority." *Wheeldin* v. *Wheeler,* 373 U. S. 647, 651 (1963). In the legislative context, for instance, "[t]his Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role." *Tenney* v. *Brandhove, supra,* at 377. Thus, we have recognized "the immunity of legislators for acts within the legislative role," *Pierson* v. *Ray, supra,* at 554, but have carefully confined that immunity to protect only acts within "the sphere of legitimate legislative activity." *Tenney* v. *Brandhove, supra,* at 376; cf. *Powell* v. *McCormack, supra.*

Because the Court has not fashioned a fixed, invariable rule of immunity but has advised a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens, there is no ready-made answer as to whether the remaining federal respondents—the Public Printer and the Superintendent of Documents—should be accorded absolute immunity in this case. Of course, to the extent that they serve legislative functions, the performance of which would be immune conduct if done by Congressmen, these officials enjoy the protection of the Speech or Debate Clause. Our inquiry here, however, is whether, if they participate in publication and distribution beyond the legislative sphere, and thus beyond the protection of the Speech or Debate Clause, they are nevertheless protected by the doctrine of official immunity. Our starting point is at least a minimum familiarity with their functions and duties.

The statutes of the United States created the office of Public Printer to manage and supervise the Government Printing Office, which, with certain exceptions, is the authorized printer for the various branches of the Federal Government. 44 U. S. C. § 301. "Printing or binding may be done at the Government Printing Office only when authorized by law." § 501. The Public Printer is authorized to do printing for Congress, §§ 701–741, 901–910, as well as for the Executive and Judicial Branches of Government, §§ 1101–1123. The Public Printer is authorized to appoint the Superintendent of Documents with duties concerning the distribution and sale of documents. §§ 1701–1722.

Under the applicable statutes, when either House of Congress orders a document printed, the Public Printer is to print the "usual number" unless a greater number is ordered. § 701. The "usual number" is 1,682, to be divided between bound and unbound copies and distributed to named officers or offices of the House and Senate, to the Library of Congress, and to the Superintendent of Documents for further distribution "to the State libraries and designated depositories." *Ibid.*[14] There are also statutory provisions for the printing of extra copies, § 702, bills and resolutions, §§ 706–708, public and private laws, postal conventions, and treaties, §§ 709–712, journals, § 713, the Congressional Directory, §§ 721–722, memorial addresses, §§ 723–724, and the Statutes at Large, §§ 728–729. Section 733 provides that "[t]he Public Printer on order of a Member of Congress, on prepayment of the cost, may reprint documents and reports of committees together with the evidence papers submitted, or any part ordered printed by the Congress."

[14] For the authorization to supply sufficient copies for such distribution see 44 U. S. C. § 738. The Public Printer is also required to furnish the Department of State with 20 copies of all congressional documents and reports. § 715.

With respect to printing for the Executive and Judicial Branches, it is provided that "[a] head of an executive department . . . may not cause to be printed, and the Public Printer may not print, a document or matter unless it is authorized by law and necessary to the public business." § 1102 (a). The executive departments and the courts are to requisition printing by certifying that it is "necessary for the public service." § 1103.

The Superintendent of Documents has charge of the distribution of all public documents except those printed for use of the executive departments, "which shall be delivered to the departments," and for either House of Congress, "which shall be delivered to the Senate Service Department and House of Representatives Publications Distribution Service." § 1702. He is thus in charge of the public sale and distribution of documents. The Public Printer is instructed to "print additional copies of a Government publication, not confidential in character, required for sale to the public by the Superintendent of Documents," subject to regulation by the Joint Committee on Printing. § 1705.

It is apparent that under this statutory framework, the printing of documents and their general distribution to the public would be "within the outer perimeter" of the statutory duties of the Public Printer and the Superintendent of Documents. *Barr* v. *Mateo,* 360 U. S., at 575. Thus, if official immunity automatically attaches to any conduct expressly or impliedly authorized by law, the Court of Appeals correctly dismissed the complaint against these officials. This, however, is not the governing rule.

The duties of the Public Printer and his appointee, the Superintendent of Documents, are to print, handle, distribute, and sell Government documents. The Government Printing Office acts as a service organization for the branches of the Government. What it prints is pro-

duced elsewhere and is printed and distributed at the direction of the Congress, the departments, the independent agencies and offices, or the Judicial Branch of the Government. The Public Printer and Superintendent of Documents exercise discretion only with respect to estimating the demand for particular documents and adjusting the supply accordingly. The existence of a Public Printer makes it unnecessary for every Government agency and office to have a printer of its own. The Printing Office is independently created and manned and invested with its own statutory duties; but, we do not think that its independent establishment carries with it an independent immunity. Rather, the Printing Office is immune from suit when it prints for an executive department for example, only to the extent that it would be if it were part of the department itself or, in other words, to the extent that the department head himself would be immune if he ran his own printing press and distributed his own documents. To hold otherwise would mean that an executive department could acquire immunity for non-immune materials merely by presenting the proper certificate to the Public Printer, who would then have the duty to print the material. Under such a holding, the department would have a seemingly foolproof method for manufacturing immunity for materials which the court would not otherwise hold immune if not sufficiently connected with the "official duties" of the department. *Howard* v. *Lyons,* 360 U. S., at 597.

Congress has conferred no express statutory immunity on the Public Printer or the Superintendent of Documents. Congress has not provided that these officials should be immune for printing and distributing materials where those who author the materials would not be. We thus face no statutory or constitutional problems in interpreting this doctrine of "judicial making." *Barr* v. *Matteo,* 360 U. S., at 569. We do, however, write in the

shadow of *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564 (1972), and *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971), where the Court advised caution "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him . . . ." *Id.*, at 437. We conclude that, for the purposes of the judicially fashioned doctrine of immunity, the Public Printer and the Superintendent of Documents are no more free from suit in the case before us than would be a legislative aide who made copies of the materials at issue and distributed them to the public at the direction of his superiors. See *Dombrowski* v. *Eastland*, 387 U. S. 82 (1967). The scope of inquiry becomes equivalent to the inquiry in the context of the Speech or Debate Clause, and the answer is the same. The business of Congress is to legislate; Congressmen and aides are absolutely immune when they are legislating. But when they act outside the "sphere of legitimate legislative activity," *Tenney* v. *Brandhove*, 341 U. S., at 376, they enjoy no special immunity from local laws protecting the good name or the reputation of the ordinary citizen.

Because we think the Court of Appeals applied the immunities of the Speech or Debate Clause and of the doctrine of official immunity too broadly, we must reverse its judgment and remand the case for appropriate further proceedings.[15] We are unaware, from this record, of the extent of the publication and distribution of the report which has taken place to date. Thus, we have little basis for judging whether the legitimate legislative needs of Congress, and hence the limits of immunity,

[15] With respect to the District of Columbia respondents, the Court of Appeals found that they were acting within the scope of their authority under applicable law and, as a result, were immune from suit. We do not disturb the judgment of the Court of Appeals in this respect.

have been exceeded. These matters are for the lower courts in the first instance.

Of course, like the Court of Appeals, we indicate nothing as to whether petitioners have pleaded a good cause of action or whether respondents have other defenses, constitutional or otherwise. We have dealt only with the threshold question of immunity.[16]

The judgment of the Court of Appeals is reversed in part and affirmed in part, and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE DOUGLAS, whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, concurring.

I agree with the Court that the issue tendered is justiciable, and that the complaint states a cause of action. Though I join the opinion of the Court, I amplify my own views as they touch on the merits.

I

Respondents, relying primarily on *Gravel* v. *United States*, 408 U. S. 606, urge that the report, concededly part and parcel of the legislative process, is immune from the purview of the courts under the Speech or Debate Clause of Art. I, § 6, of the Constitution.[1] In *Gravel* we held that neither Senator Gravel nor his

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[16] We thus have no occasion to consider Art. I, § 5, cl. 3, which requires that "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . ."; nor need we deal with publications of the Judicial Branch and the legal immunities that may be attached thereto.

[1] That Clause in relevant part provides:

"[A]nd for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."

aides could be held accountable or questioned with respect to events occurring at the subcommittee hearing at which the Pentagon Papers were introduced into the public record. The immunity in that case attached to the Senator and his aides, and there is no intimation whatsoever that committee reports are sacrosanct from judicial scrutiny. In fact, the Court disclaimed any need to "address issues that may arise when Congress or either House, as distinguished from a single Member, orders the publication and/or public distribution of committee hearings, reports, or other materials." [2] *Id.*, at 626 n. 16.

"Legislative immunity does not, of course, bar all judicial review of legislative acts." *Powell* v. *McCormack*, 395 U. S. 486, 503. "The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions." *Id.*, at 505. This has been clear since Mr. Chief Justice Marshall's seminal decision in *Marbury* v. *Madison*, 1 Cranch 137. We always have recognized the "judicial power to determine the validity of legislative actions impinging on individual rights." *Gravel* v. *United States*, *supra*, at 620.

In *Kilbourn* v. *Thompson*, 103 U. S. 168, the Court's first decision to consider the Speech or Debate Clause, the Court held unconstitutional a resolution of the House ordering the arrest of Kilbourn for refusing to honor a subpoena of a House investigating committee, since the House had no power to punish for contempt. Although the Court barred a claim for false imprisonment against Members of the House, it nevertheless

[2] The Committee report was transmitted to the House by the Chairman of the Committee, was referred to the Calendar of the Committee of the Whole House on the State of the Union, and was ordered to be printed.

reached the merits of Kilbourn's claim and allowed an action against the House's Sergeant at Arms, who had executed the warrant for Kilbourn's arrest.

Dombrowski v. *Eastland,* 387 U. S. 82, involved suits for an injunction and for damages against a Senator who headed a subcommittee of the Senate Judiciary Committee and counsel to the subcommittee for wrongful and unlawful seizure of property in violation of the Fourth Amendment. We agreed that the complaint against the Senator must be dismissed because the record "does not contain evidence of his involvement in any activity that could result in liability." *Id.,* at 84. As respects counsel to the subcommittee we held, in reliance on *Tenney* v. *Brandhove,* 341 U. S. 367, that the immunity granted by the Speech or Debate Clause "is less absolute, although applicable, when applied to officers or employees of a legislative body, rather than to legislators themselves." 387 U. S., at 85. Accordingly, we remanded the case against counsel to the subcommittee for trial because there was "a sufficient factual dispute" to require a trial. Acts done in violation of the Fourth Amendment—like assaults with fists or clubs or guns—are outside the protective ambit of the Speech or Debate Clause; *certainly violations of the Fourth Amendment are not within the scope of a legitimate legislative purpose.*

A striking illustration of the same principle was stated in *Watkins* v. *United States,* 354 U. S. 178, 188: "The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged." And see *Barenblatt* v. *United States,* 360 U. S. 109, 153, 166 (dissenting opinions of Black and BRENNAN, JJ.). A witness subpoenaed to testify before a congressional

committee may not be forced to reveal his beliefs. One's conscience and thoughts are matters of privacy as is the whole array of one's beliefs or values. And, as *Watkins* indicates, a witness refusing to so testify may not be punished for contempt. *Violations of the commands of the First Amendment are not within the scope of a legitimate legislative purpose.*

I cannot agree, then, that the question for us is "whether [public dissemination], simply because authorized by Congress, must always be considered 'an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings' with respect to legislative or other matters before the House." A legislator's function in informing the public concerning matters before Congress or concerning the administration of Government is essential to maintaining our representative democracy. Unless we are to put blinders on our Congressmen and isolate them from their constituents, the informing function must be entitled to the same protection of the Speech or Debate Clause as those activities which relate directly and necessarily to the immediate function of legislating. See *Gravel* v. *United States, supra,* at 634–637 (DOUGLAS, J., dissenting), *id.,* at 649–662 (BRENNAN, J., dissenting). In my view the question to which we should direct our attention is whether the House Report infringes upon the constitutional rights of petitioners and therefore is subject to scrutiny by the federal courts.

II

The House authorized its District Committee "to conduct a full and complete investigation and study of . . . (1) the organization, management, operation, and administration of any department or agency of the government of the District of Columbia; (2) the organization, management, operation, and administration of any independ-

ent agency or instrumentality of government operating solely in the District of Columbia." [3]

It was pursuant to this investigation and study that the report in effect brands certain named students as juvenile delinquents. As stated by Judge Wright in his dissent below:

> "The material included in the Committee report is not, as the majority contends, merely 'somewhat derogatory.' One disciplinary letter, for example, alleges that a specifically named child was 'involved in the loss of fifty cents' and 'invited a male substitute to have sexual relations with her, gapping her legs open for enticement.' Similar letters accused named children of disrespect, profanity, vandalism, assault and theft. Of the 29 test papers published in the report, 21 bore failing grades. Yet appellants seek only to prohibit use of the children's names without their consent. They do not contest the propriety of the investigation generally, nor do they seek to enjoin the conclusions or text of the report. Indeed, they do not even challenge the right of Congress to examine and summarize the confidential material involved. They wish only to retain their anonymity." 148 U. S. App. D. C. 280, 300, 459 F. 2d 1304, 1324.

We all should be painfully aware of the potentially devastating effects of congressional accusations. There are great stakes involved when officials condemn individuals by name. The age of technology has produced data banks into which all social security numbers go; and following those numbers go data in designated categories concerning the lives of members of our communities. Arrests go in, though many arrests are unconstitutional. Acts of juvenile delinquency are per-

[3] H. Res. 76, 91st Cong., 1st Sess., 115 Cong. Rec. 2784.

manently recorded and they and other alleged misdeeds or indiscretions may be devastating to a person in later years when he has outgrown youthful indiscretions and is trying to launch a professional career or move into a position where steadfastness is required.

Congress, in naming the students without justification exceeded the "sphere of legitimate legislative activity." *Tenney* v. *Brandhove,* 341 U. S., at 376. There can be no question that the resolution authorizing the investigation and study expressed a legitimate legislative purpose. Nevertheless, neither the investigatory nor, indeed, the informing function of Congress authorizes any "congressional power to expose for the sake of exposure." *Watkins* v. *United States,* 354 U. S., at 200. To the contrary, there is simply "no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress." *Id.,* at 187. The names of specific students were totally irrelevant to the purposes of the study. The functions of the Committee would have been served equally well if the students had remained anonymous.

It is true, of course, that members of Congress may, even in a case such as this, retain their immunity under the Speech or Debate Clause. But in this case, both the Public Printer and the Superintendent of Documents, official agencies entrusted by Congress with printing responsibilities, are named as defendants. And in the context of this case, such defendants may be held responsible for their actions. See *Powell* v. *McCormack, supra; Dombrowski* v. *Eastland, supra; Kilbourn* v. *Thompson, supra.*

At the very least petitioners are entitled to injunctive relief. The scope of the injunction and against whom it should operate only can be determined upon remand after a full hearing on the facts. We cannot say whether there is a threat of future public distribution or whether

it will be feasible for any person subject to the equitable powers of the court to excise the students' names from reports previously distributed. With respect to damages—that is, whether respondents, including the members of the District of Columbia Government if a valid claim is stated against them, are protected by the doctrine of official immunity as set forth in the opinion for the Court—I agree that it is a matter for the lower courts in the first instance.

MR. CHIEF JUSTICE BURGER, concurring in part and dissenting in part.

I cannot accept the proposition that the judiciary has power to carry on a continuing surveillance of what Congress may and may not publish by way of reports on inquiry into subjects plainly within the legislative powers conferred on Congress by the Constitution. The inquiries conducted by Congress here were within its broad legislative authority and the specific powers conferred by Art. I, § 8, cl. 17.

It seems extraordinary to me that we grant to the staff aides of Members of the Senate and the House an immunity that the Court today denies to a very senior functionary, the Public Printer. Historically and functionally the Public Printer is simply the extended arm of the Congress itself, charged by law with executing congressional commands.

Very recently, in *United States* v. *Brewster,* 408 U. S. 501, 516 (1972), we explicitly took note of the "conscious choice" made by the authors of the Constitution to give broad privileges and protection to Members of Congress for acts within the scope of their legislative function. As JUSTICES BLACKMUN and REHNQUIST have demonstrated so well, the acts here complained of were not outside the traditional legislative function of Congress. I join fully in the concurring and dissenting opinion of

MR. JUSTICE BLACKMUN, *post*, this page, and that of MR. JUSTICE REHNQUIST, *post*, p. 338.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

I join MR. JUSTICE REHNQUIST's opinion, *post*, p. 338, but add some comments of my own.

Each step in the legislative report process, from the gathering of information in the course of an officially authorized investigation to and including the official printing and official distribution of that information in the formal report, is legitimate legislative activity and is designed to fulfill a particular objective. More often than not, when a congressional committee prepares a report, it does so not only with the object of advising fellow Members of Congress as to the subject matter, but with the further objects (1) of advising the public of proposed legislative action, (2) of informing the public of the presence of problems and issues, (3) of receiving from the public, in return, constructive comments and suggestions, and (4) of enabling the public to evaluate the performance of their elected representatives in the Congress. The Court has recognized and specifically emphasized the importance, and the significant posture, of the committee report as an integral part of the legislative process when, repeatedly and clearly, it has afforded speech or debate coverage for a Member's writing, signing, or voting in favor of a committee report just as it has for a Member's speaking in formal debate on the floor. *Gravel* v. *United States*, 408 U. S. 606, 617, 624 (1972); *Powell* v. *McCormack*, 395 U. S. 486, 502 (1969); *Kilbourn* v. *Thompson*, 103 U. S. 168, 204 (1881).[1] That

[1] We are to read the Speech or Debate Clause "broadly to effectuate its purposes." *United States* v. *Johnson*, 383 U. S. 169, 180 (1966); *Gravel* v. *United States*, 408 U. S. 606, 624 (1972). The "central role" of the Clause is "to prevent intimidation of legislators

protection is preserved by the Court in this case, *ante*, at 311–313, because the Court appreciates that Congress must possess uninhibited internal communication.

The Court previously has observed that Congress possesses the power "to inquire into and publicize corruption, maladministration or inefficiency in the agencies of the Government" because the public is "entitled to be informed concerning the workings of its government." *Watkins* v. *United States*, 354 U. S. 178, 200 and n. 33 (1957). Indeed, as to this kind of activity, Woodrow Wilson long ago observed, "The informing function of Congress should be preferred even to its legislative function." [2] The Speech or Debate Clause is an outgrowth of the English doctrine that the courts should not be utilized as instruments to impede the efficient function-

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by the Executive and accountability before a possibly hostile judiciary," *id.*, at 617. The breadth of coverage of the Speech or Debate Clause must be no less extensive than the legislative process it is designed to protect, for the Clause insures for Congress "wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch," *id.*, at 616, or, I might suppose, from the judiciary.

[2] "It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function. The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration." W. Wilson, Congressional Government 303 (1885).

ing of Parliament. *Kilbourn* v. *Thompson,* 103 U. S., at 201–205. Because the "informing function" is an essential attribute of an effective Legislative Branch, I feel the Court's curtailment of that function today violates the historical tradition signified textually by the Speech or Debate Clause and underlying our doctrine of separation of powers.

It may be that a congressional committee's activities and report are not protected absolutely by the Speech or Debate Clause. One may assume that there must be a legitimate legislative purpose in undertaking the investigation or hearing that culminates in the report. *Watkins* v. *United States,* 354 U. S., at 200; *Barenblatt* v. *United States,* 360 U. S. 109 (1959). I suggest, however, that the publication and distribution of a report compiled in connection with an officially authorized investigation is as much an "integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation," *Gravel* v. *United States,* 408 U. S., at 625, as is the gathering of information or writing and voting for the publication of the report. In the case before us, there can be no question that the activities of the District of Columbia Committee of the House of Representatives were officially authorized and undertaken for a proper legislative purpose. Plenary jurisdiction over the District of Columbia is specifically vested in Congress by Art. I, § 8, of the Constitution.[3] Matters

[3] Article I, § 8, reads in part as follows:

"The Congress shall have Power . . .

. . . . . .

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States . . . ."

such as the quality of education afforded by the District's schools, and the administrative problems they face, obviously are within the scope of the jurisdiction of the District Committee. In this case, it legitimately undertook its investigation of the administration of the school system.[4] At the conclusion of its investigation the Committee decided, as did the Committee of the Whole House on the State of the Union,[5] that, as a matter of legislative judgment, the report should be printed. It was stated that attachments to one portion thereof were included to "give a realistic view" of a troubled school "and the lack of administrative efforts to rectify the multitudinous problems there." [6] The report was printed and distributed by the Government Printing Office pursuant to 44 U. S. C. §§ 501 and 701.[7] This decision, though reasonable men well may differ as to its wisdom, was a conscious exercise of legislative discretion consti-

[4] House Res. 76, 91st Cong., 1st Sess., 115 Cong. Rec. 2784 (1969), authorized the Committee, "as a whole or by subcommittee . . . to conduct a full and complete investigation" of the "organization, management, operation, and administration of any department or agency," and of "any independent agency or instrumentality" of government in the District of Columbia.

[5] 116 Cong. Rec. 40311 (1970).

[6] H. R. Rep. No. 91–1681, p. 212 (1970).

[7] The Court notes, *ante*, at 323, apparently in alleviation of its conclusion as to possible liability, that a specific statutory grant of immunity to the Public Printer and the Superintendent of Documents relieving them of personal liability for the distribution of an unprotected document has not been conferred. But it is not clear how, if liability otherwise exists, such a grant of immunity would shield these public servants in a case involving alleged constitutional violations. Thus, the Court has placed the Public Printer and Superintendent of Documents in the untenable position either of accepting the risk of personal liability, whenever a congressional document officially is printed and distributed, or of violating the specific command of a congressional resolution ordering the printing and distribution.

tutionally vested in the Legislative Branch and not subject to review by the judiciary. Indeed, as MR. JUSTICE REHNQUIST observes, *post*, at 339–340, this Court has stated that it is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Tenney* v. *Brandhove*, 341 U. S. 367, 377 (1951).

Although the Court in the present case holds that the gathering of information, the preparation of a report, and the voting on a resolution authorizing the printing of a committee report are protected activities under the Speech or Debate Clause, it renders that protection for Members of Congress and legislative personnel less than meaningful by further holding that the authorized public distribution of a committee document may be enjoined and those responsible for the distribution held liable when the document contains materials "otherwise actionable under local law." *Ante*, at 317. The Court's holding thus imposes on Congress the onerous burden of justifying, apparently by "substantial evidence," *ibid.*, the inclusion of allegedly actionable material in committee documents.[8] This, unfortunately, ignores the realities

[8] An interesting dilemma is presented by the possibility of an injunction against distribution where "otherwise actionable" material is printed in the Congressional Record. The Court recognizes the existence of this problem and reserves its resolution for another day. *Ante*, at 325 n. 16. The Congressional Record, however, receives wide public distribution on a regular basis and it is not an uncommon occurrence for all or part of a committee report or other document to be read into the Record by a Member of Congress. In light of the Court's holding in this case, it is conceivable that, in lieu of separate publication as a committee document, a committee report containing possibly actionable material hereafter will be printed in the Record in order to effectuate public distribution. It appears to me almost beyond question that an injunction against the distribution of the Congressional Record is clearly precluded by the Speech or Debate Clause and by the Constitution's Art. I, § 5, cl. 3, pro-

of the "deliberative and communicative processes," *Gravel* v. *United States*, 408 U. S., at 625, by which legislative decisionmaking takes place.

Although it is regrettable that a person's reputation may be damaged by the necessities or the mistakes of the legislative process,[9] the very act of determining judicially whether there is "substantial evidence" to justify the inclusion of "actionable" information in a committee report is a censorship that violates the congressional free speech concept embodied in the Speech or Debate Clause[10] and is, as well, the imposition of this Court's judgment in matters textually committed to the discretion of the Legislative Branch by Art. I of the Constitution. I suspect that Mr. Chief Justice Marshall and his concurring Justices would be astonished to learn that the time-honored doctrine of judicial review they enunciated

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viding that "[e]ach House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy."

[9] Only last Term, in *United States* v. *Brewster*, 408 U. S. 501, 516–517 (1972), the Court emphasized that:

"In its narrowest scope, the [Speech or Debate] Clause is a very large, albeit essential, grant of privilege. It has enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the Framers.

". . . The authors of our Constitution were well aware of the history of both the need for the privilege and the abuses that could flow from too sweeping safeguards. In order to preserve other values, they wrote the privilege so that it tolerates and protects behavior on the part of Members not tolerated and protected when done by other citizens, but the shield does not extend beyond what is necessary to preserve the integrity of the legislative process."

[10] I do not reach the question whether the withholding of information from the public with respect to matters being considered by elected representatives in any way diminishes protected First Amendment values.

in *Marbury* v. *Madison*, 1 Cranch 137 (1803), has been utilized to foster the result reached by the Court today.[11]

Stationing the federal judiciary at the doors of the Houses of Congress for the purpose of sanitizing congressional documents in accord with this Court's concept of wise legislative decisionmaking policy appears to me to reveal a lack of confidence in our political processes and in the ability of Congress to police its own members. It is inevitable that occasionally, as perhaps in this case, there will be unwise and even harmful choices made by Congress in fulfilling its legislative responsibility. That, however, is the price we pay for representative government. I am firmly convinced that the abuses we countenance in our system are vastly outweighed by the demonstrated ability of the political process to correct overzealousness on the part of elected representatives.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, and with whom MR. JUSTICE STEWART joins as to Part I, concurring in part and dissenting in part.

I concur in the Court's holding that the respondent Members of Congress and their committee aides and employees are immune under the Speech or Debate Clause for preparation of the Committee report for dis-

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[11] "The premise that courts may refuse to enforce legislation they think unconstitutional does not support the conclusion that they may censor congressional language they think libelous. We have no more authority to prevent Congress, or a committee or public officer acting at the express direction of Congress, from publishing a document than to prevent them from publishing the Congressional Record. If it unfortunately happens that a document which Congress has ordered published contains statements that are erroneous and defamatory, and are made without allowing the persons affected an opportunity to be heard, this adds nothing to our authority. Only Congress can deal with such a problem." *Methodist Federation for Social Action* v. *Eastland*, 141 F. Supp. 729, 731–732 (DC 1956 (three-judge court)).

tribution within the halls of Congress. I dissent from the Court's holding that Members of Congress might be held liable if they were in fact responsible for public dissemination of a committee report, and that therefore the Public Printer or the Superintendent of Documents might likewise be liable for such distribution. And quite apart from the immunity which I believe the Speech or Debate Clause confers upon congressionally authorized public distribution of committee reports, I believe that the principle of separation of powers absolutely prohibits any form of injunctive relief in the circumstances here presented.

I

In *Gravel* v. *United States*, 408 U. S. 606 (1972), we decided that the Speech or Debate Clause of the Constitution did not protect private republication of a committee report, but left open the question of whether publication and public distribution of such reports authorized by Congress would be included within the privilege. *Id.*, at 626 n. 16. While there are intimations in today's opinion that the privilege does not cover such authorized public distribution, the ultimate holding is apparently that the District Court must take evidence and determine for itself whether or not such publication in this case was within the "legitimate legislative needs of Congress," *ante*, at 324.

While there is no reason for a rigid, mechanical application of the Speech or Debate Clause, there would seem to be equally little reason for a completely *ad hoc*, factual determination in each case of public distribution as to whether that distribution served the "legitimate legislative needs of Congress." A supposed privilege against being held judicially accountable for an act is of virtually no use to the claimant of the privilege if it may only be sustained after elaborate judicial inquiry into the circumstances under which the act was performed. This

disposition is particularly anomalous when viewed in light of our earlier views on the scope of the constitutional privilege to the effect that it is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Tenney* v. *Brandhove,* 341 U. S. 367, 377 (1951). A factual hearing in the District Court could scarcely avoid inquiry into legislative motivation.

Previous decisions of this Court have upheld the immunity of Members whenever they are "acting in the sphere of legitimate legislative activity." *Id.,* at 376. In *Kilbourn* v. *Thompson,* 103 U. S. 168 (1881), we held that this immunity extends to everything "generally done in a session of the House by one of its members in relation to the business before it." *Id.,* at 204. This relatively expansive interpretation of the scope of immunity has been consistently reaffirmed. *United States* v. *Johnson,* 383 U. S. 169, 179 (1966); *United States* v. *Brewster,* 408 U. S. 501, 509 (1972).

The subject matter of the Committee report here in question was, as the Court notes, concededly within the legislative authority of Congress. Congress has jurisdiction over all matters within the District of Columbia, U. S. Const., Art. I, § 8, cl. 17, and the Committee was authorized by the full House to investigate the District's public school system. H. Res. 76, 91st Cong., 1st Sess., 115 Cong. Rec. 2784 (1969). And we have held that with respect to the preliminary inquiries, such as the findings here represent, concerning potential legislation, Congress' power "is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt* v. *United States,* 360 U. S. 109, 111 (1959).

In *Kilbourn* v. *Thompson, supra,* at 204, *Powell* v. *McCormack,* 395 U. S. 486, 502 (1969), and *Gravel* v. *United States,* 408 U. S., at 624, the Court has held that committee reports are absolutely privileged. In

neither *Kilbourn* nor *Powell* was any distinction intimated between internal and public distribution of the reports. And while the question was reserved in *Gravel*, a comparison of the factual background surrounding Senator Gravel's reading into the committee record the Pentagon Papers, and the limited publication apparently undertaken here, indicates that the difference in actual effect between the two is indeed minimal The only difference between Senator Gravel's widely publicized reading, in the presence of numerous spectators and journalists, and the public distribution of this report, is that the former was confined within the legislative halls. But it can scarcely be doubted that information produced at a publicly attended committee hearing within the legislative halls may well as a practical matter receive every bit as much public circulation as information contained in a committee report which is itself publicly circulated.

To the extent that public participation in a relatively open legislative process is desirable, the Court's holding makes the materials bearing on that process less available than they might be. And the limitation thus judicially imposed is squarely contrary to the expressed intent of Congress. The Committee report was ordered printed by the full House sitting as a Committee of the Whole House on the State of the Union. 116 Cong. Rec. 40311. It was thereafter printed and distributed by the Government Printing Office solely in accordance with statutory provisions. 44 U. S. C. §§ 501, 701. These provisions state specifically that the Public Printer may print only the number of copies designated by the Congress, such number, in the absence of contrary indication, being the "usual number" established by statute as 1,682. These copies may be distributed only "among those entitled to receive them." § 701 (a). The distributees are specifically designated in the statute it-

self. § 701 (c). Extra copies may be printed only by simple, concurrent, or joint resolution. § 703. Thus, every action taken by the Public Printer and the Superintendent of Documents, so far as this record indicates, was under the direction of Congress.

I agree with the Court that the Public Printer and the Superintendent of Documents have no "official immunity" under the authority of *Barr* v. *Matteo*, 360 U. S. 564 (1959). There is no immunity there when officials are simply carrying out the directives of officials in the other branches of Government, rather than performing any discretionary function of their own. But for this very reason, if the body directing the publication or its Members would themselves be immune from publishing and distributing, the Public Printer and the Superintendent should be likewise immune. I do not understand the Court to hold otherwise. Because I would hold the Members immune had they undertaken the public distribution, I would likewise hold the Superintendent and the Public Printer immune for having done so under the authority of the resolution and statute. The Court's contrary conclusion, perhaps influenced by the allegations of serious harm to the petitioners contained in their complaint, unduly restricts the privilege. The sustaining of any claim of privilege invariably forecloses further inquiry into a factual situation which, in the absence of privilege, might well have warranted judicial relief. The reason why the law has nonetheless established categories of privilege has never been better set forth than in the opinion of Judge Learned Hand in *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949):

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not es-

cape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."

II

Entirely apart from the immunity conferred by the Speech or Debate Clause on these respondents, I believe that the principle of separation of powers forbids the granting of injunctive relief by the District Court in a case such as this. We have jurisdiction to review the completed acts of the Legislative and Executive Branches. See, *e. g., Marbury* v. *Madison,* 1 Cranch 137 (1803);

Youngstown Sheet & Tube Co. v. *Sawyer,* 343 U. S. 579 (1952); *Kilbourn* v. *Thompson, supra.* But the prospect of the District Court's enjoining a committee of Congress, which, in the legislative scheme of things, is for all practical purposes Congress itself, from undertaking to publicly distribute one of its reports in the manner that Congress has by statute prescribed that it be distributed, is one that I believe would have boggled the minds of the Framers of the Constitution.

In *Mississippi* v. *Johnson,* 4 Wall. 475 (1867), an action was brought seeking to enjoin the President from executing a duly enacted statute on the ground that such executive action would be unconstitutional. The Court there expressed the view that I believe should control the availability of the injunctive relief here:

> "The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance." *Id.,* at 500.

In *Kilbourn* v. *Thompson, supra,* the Court reviewed the arrest and confinement of a private citizen by the Sergeant at Arms of the House of Representatives. In *Watkins* v. *United States,* 354 U. S. 178 (1957), the Court reviewed the scope of the investigatory powers of Congress when the executive had prosecuted a recalcitrant witness and sought a judicial forum for the purpose of imposing criminal sanctions on him. Neither of these cases comes close to having the mischievous possibilities of censorship being imposed by one branch of the Government upon the other as does this one.

In *New York Times Co.* v. *United States,* 403 U. S. 713 (1971), this Court held that prior restraint comes before it bearing a heavy burden. *Id.,* at 714. Whatever may

be the difference in the constitutional posture of the two situations, on the issue of injunctive relief, which is nothing if not a form of prior restraint, a Congressman should stand in no worse position in the federal courts than does a private publisher. Cf. *Hurd* v. *Hodge,* 334 U. S. 24, 34–35 (1948). Purely as a matter of regulating the exercise of federal equitable jurisdiction in the light of the principle of separation of powers, I would foreclose the availability of injunctive relief against these respondents.

UNITED STATES *v.* BISHOP

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71–1698. Argued January 16, 1973—Decided May 29, 1973

Respondent was convicted of violating 26 U. S. C. § 7206 (1), which makes it a felony when one "[w]illfully makes and subscribes any return . . . which he does not believe to be true and correct as to every material matter," after the District Court refused a lesser-included-offense jury charge under § 7207, which makes it a misdemeanor when one "willfully delivers or discloses" to the Internal Revenue Service any return or document "known by him to be fraudulent or to be false as to any material matter." The Court of Appeals reversed on the ground that "willfully" as used in § 7206 implied an evil motive and bad faith, but the same word as used in § 7207 required only a showing of unreasonable, capricious, or careless disregard for the truth. *Held:* The word "willfully" has the same meaning in §§ 7206 (1) and 7207, connoting the voluntary, intentional violation of a known legal duty, and the distinction between the statutes is found in the additional misconduct that is essential to the violation of the felony provision; hence, the District Court properly refused the requested lesser-included-offense instruction based on respondent's erroneous contention that the word "willfully" in the misdemeanor statute implied less scienter than the same word in the felony statute. Pp. 350–361.

455 F. 2d 612, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting statement, *post*, p. 362.

Richard B. Stone argued the cause for the United States. On the brief were *Solicitor General Griswold, Assistant Attorney General Crampton, Deputy Solicitor General Lacovara, Keith A. Jones,* and *John P. Burke.*

J. Richard Johnston argued the cause for respondent.

With him on the brief were *Neil F. Horton* and *Robert H. Solomon.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Chapter 75, subchapter A, of the Internal Revenue Code of 1954, as amended, 26 U. S. C. §§ 7201–7241, is concerned with tax crimes. Sections 7201–7207, inclusive, which in the aggregate relate to attempts to evade or defeat tax, to failures to act, and to fraud, all include the word "willfully" in their respective contexts. Specifically, § 7206 is a felony statute and reads:

> "§ 7206. Fraud and false statements.
>
> "Any person who—
>
> "(1) Declaration under penalties of perjury.
>
> "Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . .
>
> . . . . .
>
> "shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

Section 7207 is a misdemeanor statute [1] and reads:

> "7207. Fraudulent returns, statements, or other documents.

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[1] Title 18 U. S. C. § 1 defines felony and misdemeanor:

"§ 1. Offenses classified.

"Notwithstanding any Act of Congress to the contrary:

"(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

"(2) Any other offense is a misdemeanor."

> "Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both."

This case presents the issue of the meaning of the critical word "willfully" as it is employed in these two successive statutes. Is its meaning the same in each, or is the willfulness specified by the misdemeanor statute, § 7207, of somewhat less degree than the felony willfulness specified by § 7206?

I

Respondent, Cecil J. Bishop, was convicted by a jury on all three counts of an indictment charging him with felony violations of § 7206 (1) with respect to his federal income tax returns for the calendar years 1963, 1964, and 1965. The Court of Appeals, holding that a lesser-included-offense instruction directed to the misdemeanor statute, § 7207, was improperly refused by the trial judge, reversed the judgment of the District Court and remanded the case for a new trial. 455 F. 2d 612 (CA9 1972). Since the meaning of "willfully," as used in the tax crime statutes, has divided the circuits,[2] we granted certiorari. 409 U. S. 841 (1972).

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[2] Compare *United States* v. *Vitiello*, 363 F. 2d 240, 243 (CA3 1966) (§§ 7201 and 7203), and *Haner* v. *United States*, 315 F. 2d 792, 794 (CA5 1963) (§ 7203), where the Ninth Circuit analysis was rejected, with *United States* v. *Fahey*, 411 F. 2d 1213 (CA9), cert. denied, 396 U. S. 957 (1969) (§ 7203); *Martin* v. *United States*, 317 F. 2d 753 (CA9 1963) (§ 7203); *Abdul* v. *United States*, 254 F. 2d 292 (CA9 1958) (§§ 2707 (b) and (c) of the 1939 Code and §§ 7202 and 7203 of the 1954 Code). See also *Janko* v. *United States*, 281 F. 2d 156, 166–167 (CA8 1960), rev'd on confession of error by the Solicitor General, 366 U. S. 716 (1961) (§§ 7201 and 7207); *Lumetta* v. *United States*, 362 F. 2d 644, 646 n. 3 (CA8 1966) (§§ 7201 and

We conclude that it was proper and correct for the District Court to refuse the lesser-included-offense instruction. In our view, the word "willfully" has the same meaning in both statutes. Consequently, we reverse and remand so that the Court of Appeals may now proceed to consider the additional issues that court found it unnecessary to reach.

II

Mr. Bishop is a lawyer who has practiced his profession in Sacramento, California, since 1951. During that period, he owned an interest in a walnut ranch he and his father operated. In 1960 his secretary, Louise, married his father. The father died, and thereafter respondent's stepmother managed the ranch.

Respondent periodically sent checks to Louise. These were used to run the ranch, to pay principal on loans, and to make improvements.

Louise maintained a record of ranch expenditures and submitted an itemized list of these disbursements to respondent at the end of each calendar year. In his 1963 return respondent asserted as business deductions all amounts paid to Louise and, in addition, all the expenses Louise listed. This necessarily resulted in a double deduction for all ranch expenditures in 1963. Moreover, some of these expenditures were for repayment of loans and for other personal items that did not qualify as income tax deductions. In his 1964 and 1965 returns respondent similarly included nondeductible amounts among the ranch figures that were deducted.

The aggregate amount of improper deductions taken by respondent for the three taxable years exceeded

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7203); *Escobar* v. *United States*, 388 F. 2d 661 (CA5 1967), cert. denied, 390 U. S. 1024 (1968) (§§ 7206 (1) and 7207). Other inconsistencies in interpreting the word "willfully" have compounded the confusion. See n. 8, *infra*. Cf. *United States* v. *Lachmann*, 469 F. 2d 1043 (CA1 1972) (§§ 7201 and 7203).

$45,000. He enjoyed aggregate gross income for those years of about $70,000.

The incorrectness of the returns as filed for the three years was not disputed at trial. Transcript of Trial 869–872, 1148. Neither is it disputed here. Brief for Respondent 4.

III

Section 7206 (1), the felony statute, is violated when one "[w]illfully makes and subscribes any return," under penalties of perjury, "which he does not believe to be true and correct as to every material matter." Respondent based his defense at trial on the ground that he was not aware of the double deductions asserted in 1963 or of the improper deductions taken in the three taxable years. He claimed that his law office secretary prepared the return schedules from his records and from the information furnished by Louise; he merely failed to check the returns for accuracy.

Respondent requested lesser-included-offense instructions based on the misdemeanor statute, § 7207. This tax misdemeanor is committed by one "who willfully delivers or discloses" to the Internal Revenue Service any return or document "known by him to be fraudulent or to be false as to any material matter." Respondent argued that the word "willfully" in the misdemeanor statute should be construed to require less scienter than the same word in the felony statute. App. 28. With the state of respondent's guilty knowledge in dispute, his proposed instructions would have allowed the jury to choose between a misdemeanor based on caprice or careless disregard and a felony requiring evil purpose. The trial judge declined to give the requested instructions and, instead, gave an instruction only on the felony, requiring a finding by the jury that the defendant intended

"with evil motive or bad purpose either to disobey or to disregard the law." App. 24.

After the guilty verdict on all counts was returned, respondent was sentenced to two years' imprisonment on each count, the sentences to run concurrently. The court, however, suspended all but 90 days of each sentence and placed respondent on probation for five years on condition that he pay a fine of $5,000. App. 31.

IV

The Court of Appeals relied upon and followed, 455 F. 2d, at 614, a series of its own cases,[3] particularly *Abdul* v. *United States*, 254 F. 2d 292 (1958), enunciating the proposition that the word "willfully" has a meaning in tax felony statutes that is more stringent than its meaning in tax misdemeanor statutes.[4] Our examination of these Ninth Circuit precedents in the light of this Court's decisions leads us to conclude that the Court of Appeals' opinion cannot be sustained by this asserted distinction between § 7206 (1) and § 7207.

A. The Ninth Circuit rule appears to have been evolved from language in this Court's opinion in *Spies* v. *United States*, 317 U. S. 492 (1943). In *Spies* the defendant requested an instruction to the effect that an affirmative act was necessary to constitute a willful attempt to evade or defeat a tax, within the meaning of § 145 (b) of the Revenue Act of 1936, 49 Stat. 1703. The trial court

[3] *United States* v. *Haseltine*, 419 F. 2d 579, 581 (1970) (§§ 7201 and 7203); *United States* v. *Fahey*, n. 2, *supra*; *Eustis* v. *United States*, 409 F. 2d 228 (1969) (§ 7203); *Edwards* v. *United States*, 375 F. 2d 862 (1967) (§§ 7201, 7203, and 7206 (2)); *Martin* v. *United States*, n. 2, *supra*; *Abdul* v. *United States*, n. 2, *supra*.

[4] One possible result of this distinction, of course, is that the Government's burden in a misdemeanor case could be less than in a felony case.

refused the request. The Second Circuit affirmed. This Court reversed. We were concerned in *Spies* with a felony statute, § 145 (b), applying to one "who willfully attempts in any manner to evade or defeat any tax," and with a companion misdemeanor statute, § 145 (a), applying to one who "willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations." These statutes were the predecessors of the current §§ 7201 and 7203, respectively, of the 1954 Code. In distinguishing between the two offenses, the Court said:

> "The difference between willful failure to pay a tax when due, which is made a misdemeanor, and willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. Both must be willful, and willful, as we have said, is a word of many meanings, its construction often being influenced by its context. *United States* v. *Murdock,* 290 U. S. 389. It may well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no willful failure to disclose the liability, is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer.
>
> "Had § 145 (a) not included willful failure to pay a tax, it would have defined as misdemeanors gen-

> erally a failure to observe statutory duties to make timely returns, keep records, or supply information—duties imposed to facilitate administration of the Act even if, because of insufficient net income, there were no duty to pay a tax. It would then be a permissible and perhaps an appropriate construction of § 145 (b) that it made felonies of the same willful omissions when there was the added element of duty to pay a tax. The definition of such nonpayment as a misdemeanor, we think, argues strongly against such an interpretation." 317 U. S., at 497–498.

In *Abdul* the court considered an appeal by a taxpayer convicted of tax misdemeanors (§ 2707 (b) of the 1939 Code and § 7203 of the 1954 Code) based on failure to file but acquitted of tax felonies (§ 2707 (c) of the 1939 Code and § 7202 of the 1954 Code) based on failure to account for and pay withholding taxes. The defense was inability to pay. The trial judge instructed the jury that the term "wilful" in the misdemeanor counts meant, among other things, "capriciously or with a careless disregard whether one has the right so to act," whereas the same word in the felony counts meant "with knowledge of one's obligation to pay the taxes due and with intent to defraud the Government of that tax by any affirmative conduct." 254 F. 2d, at 294. Relying on *Spies*, the Court of Appeals approved these instructions and concluded that

> "the word 'wilful' as used in the misdemeanor statute means something less when applied to a failure to make a return than as applied to a felony non-payment of a tax. This being true, then the words used in the instruction defining 'wilful' as relates to a misdemeanor adequately and clearly point up that difference." *Ibid.*

Because of an error in the cross-examination of Abdul, his conviction was reversed. On retrial, he was again convicted. He appealed, and the judgment was affirmed. *Abdul* v. *United States,* 278 F. 2d 234 (CA9 1960). When Abdul sought certiorari, the Solicitor General conceded that the sentence under one of the counts could not stand and undertook to say that the Government would present to the District Court a motion for correction of the sentence. Certiorari, accordingly, was denied. Two Justices would have granted the writ to review the correctness of the charge "regarding the requirement of willfulness." 364 U. S. 832 (1960).

In the present case the Court of Appeals continued this *Abdul* distinction between willfulness in tax misdemeanor charges and willfulness in tax felony charges. Section 7207, it was said, requires only a showing of "unreasonable, capricious, or careless disregard for the truth or falsity of income tax returns filed," whereas § 7206 (1) "requires proof of an evil motive and bad faith." 455 F. 2d, at 615. The level of willfulness, thus, would create a disputed factual element that made appropriate a lesser-included-offense instruction.

B. The decisions of this Court do not support the holding in *Abdul,* and implicitly they reject the approach taken by the Court of Appeals. In *Spies,* the Court speculated, 317 U. S., at 495–498, that Congress could have distinguished between the regulatory aspects of the tax system, which call for compliance regardless of financial status, and the revenue-collecting aspects, which may place demands on a taxpayer he cannot meet. Since the antecedent of § 7203 (as does that section itself today) punished both failure to file and failure to pay as misdemeanors, the Court concluded that Congress had not drawn the line between felonies and misdemeanors on the basis of distinctions between the system's regulatory aspects and its revenue-collecting aspects. The reliance

in *Abdul* on that hypothetical statutory scheme, discussed by this Court in *Spies* but found not in line with what Congress had actually done, was misplaced. Utilizing the unsupported *Abdul* distinction as a foundation, the Court of Appeals constructed the further general distinction between tax felonies and tax misdemeanors, a distinction also inconsistent with prior decisions of this Court.

In *Berra* v. *United States,* 351 U. S. 131 (1956), a defendant was convicted of violating the antecedent of § 7201, namely, § 145 (b) of the 1939 Code, a felony statute identical, for present purposes, with the section of the same number in the Revenue Act of 1936 at issue in *Spies.* The defendant claimed that he was entitled to a lesser-included-offense instruction based on § 3616 (a) of the 1939 Code, the antecedent of § 7207. The Court rejected this contention, concluding that the two sections of the 1939 Code then "covered precisely the same ground." 351 U. S., at 134. Implicit in this was the conclusion that the level of intent required for tax misdemeanors was not automatically lower than the level of intent required for tax felonies.

Although the misdemeanor statute, § 3616 (a), proffered by the defendant in *Berra* did not contain the word "willfully," the *Berra* facts were presented to the Court again in *Sansone* v. *United States,* 380 U. S. 343 (1965), when the misdemeanor statutes there in issue, §§ 7207 and 7203 of the 1954 Code, both contained the word "willfully." [5] In *Sansone* the Court rejected the argu-

[5] The applicability of § 3616 (a) of the 1939 Code to income tax returns was not contested in *Berra* v. *United States,* 351 U. S. 131, 133 (1956), but the Court soon held that that statute "did not apply to evasion of the income tax." *Achilli* v. *United States,* 353 U. S. 373, 379 (1957). In *Sansone,* however, statutory revisions effected by the enactment of the 1954 Code were held to make § 7207 applicable to income tax violations. *Sansone* v. *United States,* 380 U. S. 343, 347–349 (1965).

ment that a set of facts could exist that would satisfy the willfulness element in the § 7207 misdemeanor but not in the § 7201 felony:

> "Given petitioner's material misstatement which resulted in a tax deficiency, if, as the jury obviously found, petitioner's act was willful in the sense that he knew that he should have reported more income than he did for the year 1957, he was guilty of violating both §§ 7201 and 7207. If his action was not willful, he was guilty of violating neither." 380 U. S., at 353.

The same analysis was applied to the requested lesser-included-offense instruction for § 7203. *Id.*, at 352. The clear implication of the decision in *Sansone* is that the word "willfully" possesses the same meaning in §§ 7201, 7203, and 7207. *Sansone* thus foreclosed the argument that the word "willfully" was to be given one meaning in the tax felony statutes and another meaning in the tax misdemeanor statutes.

The thesis relied upon by the Court of Appeals, therefore, was incorrect.

V

It would be possible, of course, that the word "willfully" was intended by Congress to have a meaning in § 7206 (1) different from its meaning in § 7207, and we turn now to that possibility.

We continue to recognize that context is important in the quest for the word's meaning. See *United States* v. *Murdock*, 290 U. S. 389, 394–395 (1933). Here, as in *Spies*, the "legislative history of the section[s] contains nothing helpful on the question here at issue, and we must find the answer from the [sections themselves] and [their] context in the revenue laws." [6] 317 U. S.,

[6] See H. R. Rep. No. 1337, 83d Cong., 2d Sess., A425 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess., 602–603 (1954). The prede-

at 495. We consider first, then, the sections themselves.

A. Respondent argues that both §§ 7206 (1) and 7207 apply to a fraudulent "return" and cover the same ground if the word "willfully" has the same meaning in both sections. Since "it would be unusual and we would not readily assume that Congress by the felony . . . meant no more than the same derelictions it had just defined . . . as a misdemeanor," 317 U. S., at 497, respondent concludes that Congress must have intended to require a more willful violation for the felony than for the misdemeanor.

The critical difficulty for respondent is that the two sections have substantially different express terms. The most obvious difference is that § 7206 (1) applies only if the document "contains or is verified by a written declaration that it is made under the penalties of perjury." No equivalent requirement is present in § 7207. Respondent recognizes this but then relies on the presence of perjury declarations on all federal income tax returns, a fact that effectively equalizes the sections where a federal tax return is at issue. See 26 U. S. C. § 6065 (a).[7]

This approach, however, is not persuasive for two reasons. First, the Secretary or his delegate has the power under § 6065 (a) to provide that no perjury declaration is required. If he does so provide, then § 7207

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cessor to § 7206 (1) was § 3809 (a) of the 1939 Code. The antecedent to § 7207 was, as we have noted above, § 3616 (a) of the 1939 Code. See *Sansone*, 380 U. S., at 347.

[7] "§ 6065. Verification of returns.

"(a) Penalties of perjury.

"Except as otherwise provided by the Secretary or his delegate, any return, declaration, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under the penalties of perjury." See also Treas. Reg. § 1.6065–1 (1972).

immediately becomes operative in the area theretofore covered by § 7206 (1). Second, the term "return" is not necessarily limited to a federal income tax return. A state or other nonfederal return could be intended and might not contain a perjury warning. If this type of return were submitted in support of a federal return, or in the course of a tax audit, § 7207 could apply even if § 7206 (1) could not.

There are other distinctions. The felony applies to a document that a taxpayer "[w]illfully makes and subscribes . . . and which he does not believe to be true and correct as to every material matter," whereas the misdemeanor applies to a document that a taxpayer "willfully delivers or discloses to the Secretary or his delegate . . . known by him . . . to be false as to any material matter." In the felony, then, the taxpayer must verify the return or document in writing, and he is liable if he does not affirmatively believe that the material statements are true. For the misdemeanor, however, a document prepared by another could give rise to liability on the part of the taxpayer if he delivered or disclosed it to the Service; additional protection is given to the taxpayer in this situation because the document must be known by him to be fraudulent or to be false.

These differences in the respective applications of §§ 7206 (1) and 7207 provide solid evidence that Congress distinguished the statutes in ways that do not turn on the meaning of the word "willfully." Judge Hastie, in analyzing this Court's holding in *Spies*, appropriately described this distinction as follows:

> "However, this distinction is found in the additional misconduct which is essential to the violation of the felony statute . . . and not in the quality

> of willfulness which characterizes the wrongdoing." *United States* v. *Vitiello,* 363 F. 2d 240, 243 (CA3 1966).

Thus the word "willfully" may have a uniform meaning in the several statutes without rendering any one of them surplusage. We next turn to context.

B. The hierarchy of tax offenses set forth in §§ 7201–7207, inclusive, utilizes the mental state of the offender as a guide in establishing the penalty. Section 7201, relating to attempts to evade or defeat tax, has been described and recognized by the Court as the "climax of this variety of sanctions" and as the "capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency." *Spies,* 317 U. S., at 497; *Sansone,* 380 U. S., at 350–351. The actor's mental state is described both by the requirement that acts be done "willfully" and by the designation of certain express elements of the offenses. In § 7201, for example, the Court has held that, by requiring an attempt to evade, "Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors." *Spies,* 317 U. S., at 499. Similarly, in § 7207, the Government must show that the document was known by the taxpayer to be fraudulent or to be false as to a material matter.

All these offenses, except two subsections of § 7206, *viz.,* subsections (3) and (4), require that acts be done "willfully." Although the described states of mind might be included in the normal meaning of the word "willfully," the presence of both an express designation and the simultaneous requirement that a violation be committed "willfully" is strong evidence that Congress used

the word "willfully" to describe a constant rather than a variable in the tax penalty formula.[8]

The Court, in fact, has recognized that the word "willfully" in these statutes generally connotes a voluntary, intentional violation of a known legal duty. It has formulated the requirement of willfulness as "bad faith or evil intent," *Murdock*, 290 U. S., at 398, or "evil motive and want of justification in view of all the financial circumstances of the taxpayer," *Spies*, 317 U. S., at 498, or knowledge that the taxpayer "should have reported more income than he did." *Sansone*, 380 U. S., at 353. See *James* v. *United States*, 366 U. S. 213, 221 (1961); *McCarthy* v. *United States*, 394 U. S. 459, 471 (1969).

This longstanding interpretation of the purpose of the recurring word "willfully" promotes coherence in the group of tax crimes. In our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law. The Court has said, "It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the

[8] Semantic confusion sometimes has been created when courts discuss the express requirement of an "attempt to evade" in § 7201 as if it were implicit in the word "willfully" in that statute. This type of analysis produces language suggesting that "willfully" in § 7201 has a different meaning from the same term in § 7203. See *United States* v. *Ming*, 466 F. 2d 1000, 1004 (CA7), cert. denied, 409 U. S. 915 (1972) (§§ 7201 and 7203); *United States* v. *Matosky*, 421 F. 2d 410 (CA7), cert. denied, 398 U. S. 904 (1970) (§ 7203); *United States* v. *Haseltine*, 419 F. 2d, at 581; *Edwards* v. *United States*, 375 F. 2d, at 867; *United States* v. *Schipani*, 362 F. 2d 825, 831 (CA2), cert. denied, 385 U. S. 934 (1966). This Court may be somewhat responsible for this imprecision because a similar analysis was employed in *Spies* v. *United States*, 317 U. S 492, 497–499 (1943). Greater clarity might well result from an analysis that distinguishes the express elements, such as an "attempt to evade," prescribed by § 7201, from the uniform requirement of willfulness.

exercise of reasonable care." *Spies,* 317 U. S., at 496. Degrees of negligence give rise in the tax system to civil penalties. The requirement of an offense committed "willfully" is not met, therefore, if a taxpayer has relied in good faith on a prior decision of this Court. *James* v. *United States,* 366 U. S., at 221–222. Cf. *Lambert* v. *California,* 355 U. S. 225 (1957). The Court's consistent interpretation of the word "willfully" to require an element of *mens rea* implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers.

Until Congress speaks otherwise, we therefore shall continue to require, in both tax felonies and tax misdemeanors that must be done "willfully," the bad purpose or evil motive described in *Murdock, supra.* We hold, consequently, that the word "willfully" has the same meaning in § 7207 that it has in § 7206 (1). Since the only issue in dispute in this case centered on willfulness, it follows that a conviction of the misdemeanor would clearly support a conviction for the felony.[9] Under these circumstances a lesser-included-offense instruction was not required or proper, for in the federal system it is not the function of the jury to set the penalty. *Berra* v. *United States,* 351 U. S., at 134–135.

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[9] The Government has argued that the misdemeanor of § 7207 could never be a lesser included offense in § 7206 (1) because the misdemeanor requires that the actor have knowledge of the falsity. This is said to create an additional element in the misdemeanor, not present in the felony, so the misdemeanor is not "necessarily included" in the felony, within the meaning of Fed. Rule Crim. Proc. 31 (c). Our conclusion that the word "willfully" has the same meaning in both statutes makes it unnecessary to reach this contention.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

It is so ordered.

MR. JUSTICE DOUGLAS would affirm the judgment of the Court of Appeals for the Ninth Circuit on the opinion written for that court by Judge Powell. 455 F. 2d 612.

Syllabus

UNITED STATES *v.* STATE TAX COMMISSION OF MISSISSIPPI ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

No. 72-350. Argued March 19, 1973—Decided June 4, 1973

The United States brought this action contesting the validity of appellee Tax Commission's regulation requiring out-of-state liquor distillers and suppliers to collect and remit to the Commission a wholesale markup on liquor sold to military officers' clubs and other nonappropriated fund activities located on bases within Mississippi, over two of which the United States exercises exclusive jurisdiction, and the remaining two of which concurrent jurisdiction. Relying on the Twenty-first Amendment, the District Court upheld the regulation. *Held:*

1. The Twenty-first Amendment does not empower a State to tax or otherwise regulate the importation of distilled spirits into a territory over which the United States exercises exclusive jurisdiction, *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518, regardless of whether some of the liquor may have been consumed off base. Pp. 369–378.

2. Whether the markup can be viewed as a sales tax to whose imposition in the context of the two exclusive-jurisdiction bases the United States has consented under the Buck Act, and whether, in any event, the markup unconstitutionally taxes federal instrumentalities, and violates the Supremacy Clause as conflicting with federal procurement regulations and policy, are issues that the District Court did not reach and should consider initially on remand. Pp. 378–381.

340 F. Supp. 903, vacated and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 381.

Jewell S. Lafontant argued the cause for the United States. On the brief were *Solicitor General Griswold,*

Assistant Attorney General Wood, Mark L. Evans, Robert E. Kopp, and *Anthony J. Steinmeyer.*

Robert L. Wright argued the cause for appellees. With him on the brief was *Guy N. Rogers,* Assistant Attorney General of Mississippi.

Mr. JUSTICE MARSHALL delivered the opinion of the Court.

In this case we are called upon to review the judgment of the District Court for the Southern District of Mississippi that the State of Mississippi may require out-of-state liquor distillers and suppliers to collect and remit to the State a wholesale markup on liquor sold to officers' clubs, ship's stores, and post exchanges located on various military bases over which the United States exercises either exclusive jurisdiction or jurisdiction concurrent with the State.

Prior to 1966, the State of Mississippi prohibited the sale or possession of alcoholic beverages within its borders. In that year, Mississippi passed a local option alcoholic beverage control law subject to the requirement that the State Tax Commission be the sole importer and wholesaler of alcoholic beverages distributed within the State.[1] The Tax Commission was given exclusive authority to act as wholesale distributor in the sale of alcoholic beverages to licensed retailers within the State "including, at the discretion of the Commission, any retail distributors operating within any military post . . . within the boundaries of the State, . . . exercising such control over the distribution of alcoholic beverages as [seems] right and proper in keeping with the provisions and purposes of this act."[2] In conjunction with these transactions with retailers, the Commission was directed to

[1] Miss. Code Ann. § 10265–01 *et seq.* (Supp. 1972).
[2] *Id.,* § 10265–18 (c).

"add to the cost of all alcoholic beverages such . . . markups as in its discretion will be adequate to cover the cost of operation of the State wholesale liquor business, yield a reasonable profit, and be competitive with liquor prices in neighboring states." [3] Under the authority granted to it by the Act, the Tax Commission promulgated Regulation 25 [4] which gives military post exchanges, ship's stores, and officers' clubs the option of purchasing liquor either from the Commission or directly from the distiller. However, insofar as purchases are made directly from the distillers by such military facilities, the regulation requires the distiller to collect and remit to the Tax Commission the latter's "usual wholesale markup." During the period involved in this case, the Tax Commission's wholesale markup was 17% on distilled spirits and 20% on wine.

Four United States military bases are located in the State of Mississippi—Keesler Air Force Base, the Naval Construction Battalion Center, Columbus Air Force Base, and Meridian Naval Air Station. Prior to 1966, the officers' clubs, the post exchanges, and the ship's stores—

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[3] *Id.*, § 10265–106.

[4] The Regulation, which was originally numbered 22, reads as follows:

"Post exchanges, ship stores, and officers' clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller or from the Alcoholic Beverage Control Division of the State Tax Commission. In the event an order is placed by such organization directly with a distiller, a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.

"All orders of such organizations shall bear the usual wholesale markup in price but shall be exempt from all state taxes. The price of such beverages shall be paid by such organizations directly to the distiller, which shall in turn remit the wholesale markup to the Alcoholic Beverage Control Division of the State Tax Commission monthly covering shipments made for the previous month."

which are run with funds derived from operations rather than from funds appropriated by the United States—on these four bases had purchased liquor from distillers and suppliers located outside the State of Mississippi. Following the passage of the Mississippi local option law, these nonappropriated fund activities elected to continue the practice of purchasing liquor supplies outside the State rather than to purchase liquor from the Commission. Efforts were made by military authorities to convince the Commission not to collect the markup on out-of-state liquor purchases by nonappropriated fund activities, but these efforts failed, and the Commission compelled out-of-state distillers and suppliers to collect and remit the markup on military sales under threat of criminal prosecution and of delisting, that is, withdrawal of the privilege of selling to the Commission for retailing within Mississippi.[5] The military authorities sought to pay the markup into an escrow fund pending judicial determination of the legality of the markup as applied to military purchases. But the Commission refused to accept such an arrangement, and in order to obtain liquor supplies the nonappropriated fund activities have had to pay the markup to the distillers and suppliers, albeit under protest.[6]

In November 1969, the United States brought this action seeking declaratory and injunctive relief against the continued enforcement of Regulation 25, plus a judgment in the total amount paid to the Commission, through the suppliers, since the imposition of the markup on military purchases. The complaint alleged that the United States has exclusive jurisdiction over Keesler Air Force Base and the Naval Construction Battalion Center, and that Mississippi and the United States exercise concur-

[5] See Stipulation of Facts (hereinafter Stipulation) App. 36–38.

[6] Out-of-state suppliers had been paid $648,421.92 under protest for such markups by July 31, 1971.

rent jurisdiction over Columbus Air Force Base and Meridian Naval Air Station. The complaint contended that the Regulation was invalid because it constituted an attempt by the State to legislate with respect to military facilities and territory over which the Congress has exclusive legislative authority;[7] to impose a tax on federal instrumentalities and thereby infringe upon the Federal Government's immunity from state taxation;[8] and to interfere with federal procurement regulations and policy established by the Secretary of Defense pursuant to authority granted to him by Congress.[9] The complaint also asked that a three-judge court be convened.

On cross-motions for summary judgment, the District Court ruled in favor of the Commission, upholding the validity of the challenged Regulation. 340 F. Supp. 903 (SD Miss. 1972). The District Court agreed that the United States had exclusive jurisdiction over two of the four bases and concurrent jurisdiction over the remaining two. But it concluded that Congress' constitutional powers over the military forces and over territory belonging to the United States "are diminished by the express prohibition of the XXI Amendment as to all packaged liquor transactions which (1) are made on exclusively federal enclaves but without restriction upon use and consumption of such liquors outside the base, or (2) take place on military installations over which the state and federal government exercise concurrent jurisdiction." *Id.*, at 904. In light of this conclusion the District Court found it unnecessary to consider the import of the procurement regulations issued by the Secretary of Defense. Nor did it discuss the contention that the markup con-

[7] See U. S. Const., Art. I, § 8, cls. 14 and 17, Art. IV, § 3.

[8] See, *e. g.*, *M'Culloch* v. *Maryland*, 4 Wheat. 316 (1819).

[9] See 32 CFR § 261.4 (c).

stituted an impermissible tax upon federal instrumentalities. On appeal by the United States, we noted probable jurisdiction, 409 U. S. 1005 (1972).[10] For the reasons which follow, we now hold that the District Court erred in concluding that the Twenty-first Amendment provides the State with sufficient authority over liquor transactions to support the application of the Regulation to the two bases over which the United States exercises exclusive jurisdiction,[11] and we vacate and remand the case to the District Court for consideration of further arguments, relevant to the nonappropriated fund activities on all four bases, that it did not reach.

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[10] See *Paul* v. *United States*, 371 U. S. 245, 249–250 (1963).

[11] In a special concurring opinion, Judge Cox added that recoupment of the sums paid under the markup was also barred because, in his view, the payments had been voluntarily made by the nonappropriated fund activities. 340 F. Supp., at 909. It is true that where voluntary payment is knowingly made pursuant to an illegal demand, recovery of that payment may be denied. See, *e. g.*, *United States* v. *New York & Cuba Mail S. S. Co.*, 200 U. S. 488, 493–494 (1906); *Little* v. *Bowers*, 134 U. S. 547, 554 (1890); *Railroad Co.* v. *Commissioners*, 98 U. S. 541, 543–544 (1879). But no such voluntary payments are involved here. The Tax Commission refused to accept an escrow arrangement and it made clear to the out-of-state suppliers that severe sanctions would be applied to anyone who failed to charge the markup and to remit the resulting funds to it. Thus, the Tax Commission gave the nonappropriated fund activities no choice except to pay the markup—either to itself or to the out-of-state suppliers—in order to obtain liquor supplies or else to cease dispensing alcoholic beverages altogether—that is, to discontinue an entire line of business. Obviously, this was no choice at all. The payments of the markup were obtained only by coercion; they were paid under protest; and thus they hardly can be said to have been voluntary. See, *e. g.*, *Ward* v. *Board of County Comm'rs of Love County*, 253 U. S. 17, 23 (1920); *Atchison, T. & S. F. R. Co.* v. *O'Connor*, 223 U. S. 280, 286–287 (1912); *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320, 329 (1909); *Swift Co.* v. *United States*, 111 U. S. 22, 28–29 (1884).

I

A. With respect to the two bases over which it claims exclusive jurisdiction, Keesler Air Force Base and the Naval Construction Battalion Center, the Government places principal reliance upon Art. I, § 8, cl. 17, of the Constitution. That clause empowers Congress to "exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."

In *Pacific Coast Dairy, Inc.* v. *Dept. of Agriculture,* 318 U. S. 285 (1943), the Court considered that clause sufficient to render ineffective an attempt by the State of California to fix the prices at which California milk producers could sell milk to military authorities at Moffett Field, over which the United States exercised exclusive jurisdiction.

> "When the federal government acquired the tract [upon which Moffett Field was located], local law not inconsistent with federal policy remained in force until altered by national legislation. The state statute involved was adopted long after the transfer of sovereignty and was without force in the enclave. It follows that contracts to sell and sales consummated within the enclave cannot be regulated by the California law. To hold otherwise would be to affirm that California may ignore the Constitutional provision that 'This Constitution, and the laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; . . .' It would be a denial of the federal power 'to exercise exclusive Legislation.' As respects such federal territory Congress has the com-

bined powers of a general and a state government." *Id.*, at 294 (footnotes omitted).

The view of Art. I, § 8, cl. 17, expressed in *Pacific Coast Dairy* was reaffirmed in *Paul* v. *United States*, 371 U. S. 245, 263–270 (1963). There the Court was confronted with another attempt by California to enforce minimum wholesale price regulations on sales of milk to the United States at three other military installations located within the State. A portion of the milk was purchased—as are the liquor supplies here at issue—with nonappropriated funds for use at officers' clubs and for resale at post exchanges. As to these nonappropriated fund purchases, the Court found it necessary to remand the case to determine whether the state regulatory scheme predated the transfer of sovereignty over any of the particular bases to the United States,[12] and, even if not, whether the United States in fact exercised exclusive jurisdiction over the areas in which purchases and sales of milk were made. But in so doing the Court emphasized that "[t]he cases make clear that the grant of 'exclusive' legislative power to Congress over enclaves that meet the requirements of Art. I, § 8, cl. 17, by its own weight, bars state regulation without specific congressional action." *Id.*, at 263.

Were it not for the fact that we deal here with a State's

[12] "The Constitution does not command that every vestige of the laws of the former sovereignty must vanish. On the contrary its language has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred. This assures that no area however small will be without a developed legal system for private rights." *James Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 99–100 (1940).

See also *Pacific Coast Dairy, Inc.* v. *Dept. of Agriculture*, 318 U. S. 285, 294 (1943); *Murray* v. *Joe Gerrick & Co.*, 291 U. S. 315, 318 (1934); *Chicago, R. I. & P. R. Co.* v. *McGlinn*, 114 U. S. 542, 546–547 (1885).

attempt to regulate and derive income from wholesale transactions in liquor—a fact which raises further questions as to the extent of the power conferred upon the States under the Twenty-first Amendment and the possibility of consent by the United States to state taxation—*Pacific Coast Dairy* and *Paul* would seem to be sufficient to dispose of this case insofar as Keesler Air Force Base and the Naval Construction Battalion Center are concerned. See also *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 140 (1937); *Standard Oil Co.* v. *California*, 291 U. S. 242 (1934). The transactions here at issue are strictly between the United States and out-of-state distillers and suppliers. The goods are ordered by the officers' clubs and other nonappropriated fund activities and then delivered within the military bases over which the United States claims exclusive jurisdiction. Thus, with respect to the initial sale and delivery of the liquor by the suppliers to military facilities located in exclusively federal enclaves, nothing occurs within the State that gives it jurisdiction to regulate the initial wholesale transaction.[13] Cf. *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U. S. 361, 382–383 (1964); *Penn Dairies, Inc.* v. *Milk Control Comm'n*, 318 U. S. 261 (1943).

There can be no question that the tracts of land upon which Keesler Air Force Base and the Naval Construction Battalion Center are located were "purchased by the Consent of the Legislature" of Mississippi within the meaning of Art. I, § 8, cl. 17. Despite its ultimate resolution of the case, the District Court acknowledged that the United States had acquired exclusive jurisdiction over these two bases. 340 F. Supp., at 904, 906. The Federal Government acquired the relevant lands by condemnation

[13] The State's power to regulate transportation of alcoholic beverages through its territory to the bases or from the bases back into its jurisdiction is, however, a different question, see *infra*, at 377–378.

between 1941 and 1950.[14] And, throughout the period of acquisition, the State had expressly given its "consent . . . , in accordance with the 17th clause, 8th section, and of the 1st article of the Constitution of the United States, to the acquisition by the United States, by purchase, condemnation or otherwise, of any land in this state . . . for custom houses, post offices, or other public buildings," [15] subject only to the right of the State to serve civil and criminal process upon such public lands.[16] True, the assent of the United States to the exercise of exclusive jurisdiction over the lands occupied by the two bases was a necessary final step in light of 40 U. S. C. § 255,[17] but such assent was given through a

[14] See Stipulation, App. 28–29, and Ex. 1–7. It is well established that land which the Government acquires by condemnation has been "purchased" within the meaning of Clause 17. See *Paul* v. *United States*, 371 U. S., at 264; *Humble Pipe Line Co.* v. *Waggonner*, 376 U. S. 369, 371–372 (1964).

[15] Miss. Code Ann. § 4153. General consent statutes are not uncommon, see *Paul* v. *United States*, *supra*, at 265 and n. 31; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 143 and n. 4 (1937), and they are as effective for purposes of Art. I, § 8, cl. 17, as consent to each particular acquisition, see *Paul* v. *United States*, *supra*, at 268–269.

[16] See Miss. Code Ann. § 4154. The effectiveness of such qualifications to consent has long been accepted, see, *e. g.*, *Paul* v. *United States*, *supra*, at 264–265; *James* v. *Dravo Contracting Co.*, *supra*, at 146–149.

[17] Section 255 provides in relevant part:

"Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he

series of letters from Government officials to the Governors of Mississippi between 1942 and 1950.[18]

Accordingly, unless the fact that in this case the State has attempted to derive revenue from private wholesale liquor transactions provides a decisive distinction, our prior cases make it clear that the Tax Commission could not attach its markup to the sale and delivery of liquor by out-of-state suppliers to nonappropriated fund activities within Keesler Air Force Base and the Naval Construction Battalion Center.

B. But the Tax Commission contends—as the District Court held—that the application of the markup regulation to the two bases over which the United States exercises exclusive jurisdiction is sustainable on the basis of the broad regulatory authority conferred upon the States by the Twenty-first Amendment. The second section of the Twenty-first Amendment provides:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

In *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S. 518 (1938), a concessionaire which operated hotels, camps,

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may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."

[18] See Stipulation, App. 28–29, and Ex. 1–7.

Since the challenged regulation first became effective in 1966, long after the United States had acquired jurisdiction over the bases, there is no question here as to the application within a federal enclave of a state law that predates the transfer of sovereign authority, see n. 12, *supra*.

and stores in Yosemite National Park, under a contract with the Secretary of the Interior, sought to enjoin the efforts of California authorities to enforce the State's Alcoholic Beverage Control Act within the limits of the Park. The state liquor law would have required the concessionaire to apply for permits for the importation and sale of liquor and to pay related taxes and fees. The Court found that the State had ceded to the United States, and that the United States had accepted, exclusive jurisdiction over Yosemite National Park, except insofar as the State had expressly reserved the right to tax persons and corporations within the Park. *Id.*, at 527–530. In light of this determination, the Court held that "[a]s there is no reservation of the right to control the sale or use of alcoholic beverages, such regulatory provisions as are found in the Act"—namely, the provisions concerning importation and sales permits—"are unenforceable in the Park." *Id.*, at 530. In support of its attempt to apply the permit provisions within the Park, the State placed specific reliance upon the regulatory authority conferred upon it by § 2 of the Twenty-first Amendment. But the Court rejected this argument, agreeing instead with the District Court's conclusion "that though the Amendment may have increased 'the state's power to deal with the problem . . . [of liquor importation], it did not increase its jurisdiction.'" *Id.*, at 538. The Court then went on to state:

> "As territorial jurisdiction over the Park was in the United States, the State could not legislate for the area merely on account of the XXI Amendment. There was no transportation into California 'for delivery or use therein.' The delivery and use is in the Park, and under a distinct sovereignty. Where exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages,

> the XXI Amendment is not applicable." *Ibid.* (Footnotes omitted.)

It is true, as the Tax Commission argues, that the Court did sustain the application of the tax provisions of the state liquor law within the Park. But this aspect of the decision was bottomed specifically on the State's reservation of taxing authority in its cession of lands to the United States, *id.*, at 532, 536.

Collins would seem to compel the conclusion that absent an appropriate express reservation—which is lacking here—the Twenty-first Amendment confers no power on a State to regulate—whether by licensing, taxation, or otherwise—the importation of distilled spirits into territory over which the United States exercises exclusive jurisdiction. See also *Johnson* v. *Yellow Cab Transit Co.*, 321 U. S. 383 (1944). Certainly, the Amendment was intended to free the State of "traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 330 (1964). See also *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35, 42 (1966). But the Government contends that here, as in *Collins*, there was no "transportation or importation [of liquor] into [the] State . . . for delivery or use therein" within the meaning of the second section and therefore the Twenty-first Amendment does not assist the Tax Commission's case. We agree.

The District Court acknowledged that Keesler Air Force Base and the Naval Construction Battalion Center "are to Mississippi as the territory of one of her sister states or a foreign land. They constitute federal islands which no longer constitute any part of Mississippi nor function under its control." 340 F. Supp., at 906. And it recognized that in light of *Collins*, "[t]he importation

of property onto these bases for use thereon would clearly be outside the ambit of the XXI Amendment." *Id.*, at 906–907. But the court considered *Collins* to be limited strictly to the situation in which delivery and use of the liquor was restricted to the exclusive enclave, whereas in this case "[t]he undisputed facts show that it was acquired for the purpose of being sold to individuals for their use and consumption either on the base or in the surrounding state." *Id.*, at 907. Such off-base consumption was sufficient, in the District Court's view, to subject the transactions between the out-of-state suppliers and the nonappropriated fund activities to the regulatory authority granted to Mississippi under the Twenty-first Amendment. We think, however, that the District Court unjustifiably narrowed the decision in *Collins*.

There is, in fact, no indication in *Collins* that the liquor purchased from the concessionaire's facilities in the Park was always consumed within the limits of the Park. To the contrary, the complaint in that case specifically stated that the liquor imported for sale in the park facilities was sold "for consumption on or off the premises where sold." [19] Hence, it is just as reasonable to assume that some of the liquor sold in the Park was consumed outside its limits in the State of California as it is to assume that some of the liquor sold on these two bases was ultimately consumed in the State of Mississippi.[20] The

[19] Transcript of Record, No. 870, O. T. 1937, p. 3.

[20] In fact, the record in this case contains no express indication as to the extent to which packaged liquor purchased from the nonappropriated fund activities is consumed outside the jurisdiction of the two bases. The District Court inferred off-base consumption from the facts that "numerous classes of non military persons are authorized to make purchases; and every selling facility exacts a promise from each purchaser that he will obey the laws of the state as to such of the liquor bought as may be taken off of the installation." 340 F. Supp., at 905. By a parity of reasoning the likelihood that some of the liquor purchased from stores located in Yosemite National

Collins Court, in rejecting California's reliance upon the Twenty-first Amendment, pointed, to be sure, to the fact that "delivery and use" of the liquor was "in the Park," 304 U. S., at 538. But, considered in the context of the case, the Court's reference clearly was to the transaction between the out-of-state suppliers and the park concessionaire. It was that transaction which California sought to regulate, and insofar as that transaction was concerned, the delivery and use—that is, the delivery, storage, and sale—of the liquor occurred exclusively within the Park. The particular transactions at issue in this case between out-of-state suppliers and the military facilities stand on no different footing, and thus, given that the State has retained only the right to serve process on the two bases, *Collins* is dispositive of the Commission's effort to invoke the State's authority under the second section of the Twenty-first Amendment to impose its markup on these transactions.

This is not to suggest that the State is without authority either to regulate liquor shipments destined for the bases while such shipments are passing through Mississippi or to regulate the transportation of liquor off the bases and into Mississippi for consumption there. Thus, while it may be true that the mere "shipment [of liquor] through a state is not transportation or importation into the state within the meaning of the [Twenty-first] Amendment," *Carter* v. *Virginia,* 321 U. S. 131, 137 (1944), a State may, in the absence of conflicting federal regulation, properly exercise its police powers to regulate and control such shipments during their passage through its territory insofar as necessary to prevent the "unlawful diversion" of liquor "into the internal commerce of the State," see *Hostetter* v. *Idlewild Bon Voyage Liquor*

Park was transported to and consumed in California is even greater since those stores were open to the public at large.

Corp., 377 U. S., at 333, 331 n. 10; *Carter* v. *Virginia*, *supra*; *Duckworth* v. *Arkansas*, 314 U. S. 390 (1941). And the State, of course, remains free to regulate or restrict, under § 2 of the Twenty-first Amendment, the transportation off the two bases of liquor that has been purchased and is in fact "destined for use, distribution, or consumption" within its borders, see *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S., at 42; see also *California* v. *LaRue*, 409 U. S. 109, 114 (1972).

But there is no indication here that the markup is an effort to deal with problems of diversion of liquor from out-of-state shipments destined for one of the two bases. Nor need we now decide the precise parameters of the State's authority to regulate efforts to import liquor from the exclusively federal enclaves, since that question is not before us. For our purposes here, it suffices to note that any legitimate state interest in regulating the importation into Mississippi of liquor purchased on the bases by individuals cannot effect an extension of the State's territorial jurisdiction so as to permit it to regulate the distinct transactions between the suppliers and the nonappropriated fund activities that involve only the importation of liquor into the federal enclaves which "are to Mississippi as the territory of one of her sister states or a foreign land," 340 F. Supp., at 906. To conclude otherwise would be to give an unintended scope to a provision designed only to augment the powers of the States to regulate the importation of liquor destined for use, distribution, or consumption in its own territory, not to " 'increase its jurisdiction,' " *Collins* v. *Yosemite Park & Curry Co.*, 304 U. S., at 538.

C. Before this Court the Tax Commission also asserts that the markup might properly be viewed as a sales tax and that the United States has consented to the imposition of such a "tax" in the context of the two exclusive jurisdiction bases under the Buck Act of 1940,

54 Stat. 1059, now 4 U. S. C. §§ 105–110. Section 105 (a) of that Act provides in part:

> "No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal Area . . . ." 4 U. S. C. § 105 (a).

However, § 107 (a) of the Act spells out certain exceptions to the consent provision contained in § 105 (a). Specifically, § 107 (a) states that § 105 (a) "shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof . . . ." Whether the markup should be treated as a tax on sales occurring within a federal area within the meaning of § 105 (a), see also 4 U. S. C. § 110 (b), and, if so, whether the exception contained in § 107 (a) nevertheless serves to remove the markup from the consent provision for purposes of the two exclusively federal enclaves are issues which the record reveals were never considered, much less decided, by the District Court. Having found that the District Court erred in the basis on which it did dispose of this case, we think that these additional issues are appropriately left for determination by that court in the first instance on remand.

II

The two bases over which the United States claims to exercise jurisdiction concurrent with the State—Columbus Air Force Base and Meridian Naval Air Station—present somewhat different problems. Since the United States has not acquired exclusive jurisdiction over the land upon which these bases are located, the Government

is unable to rest its claims for immunity from the markup with respect to purchases of liquor for the nonappropriated fund activities of these bases on Art. I, § 8, cl. 17. Rather, it bases its argument on the theories that the markup either is an unconstitutional tax upon instrumentalities of the United States[21] or is invalid under the Supremacy Clause because it conflicts with federal procurement regulations and policy.[22] The District Court specifically found it unnecessary to reach the Government's argument under the Supremacy Clause, and implicitly declined to reach the Government's argument concerning taxation of United States instrumentalities. Instead, having concluded that, despite Art. I, § 8, cl. 17, the Twenty-first Amendment permitted the Tax Commission to apply the markup to out-of-state purchases destined for nonappropriated fund activities on the two bases over which the United States exercises exclusive jurisdiction, the District Court simply reasoned that "[a] fortiori, the liquor sales made on the two bases over which the federal and state governments exercise concurrent jurisdiction—Meridian and Columbus—are similarly subject to Mississippi law." 340 F. Supp., at 907.

The District Court's rationale for adopting this view is not entirely clear. Certainly it was correct when it further observed that "as to the concurrent jurisdiction bases, the liquor sales transactions occurred within the jurisdiction of the State of Mississippi, even where the consumption or other use of the liquor was consummated within the territorial confines of the base." *Ibid.* But this serves only to dispose of any question under Art. I, § 8, cl. 17. As already noted, however, the Government does not purport to rest its case with respect to transac-

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[21] See, *e. g.*, *M'Culloch* v. *Maryland*, 4 Wheat. 316 (1819).

[22] See 32 CFR § 261.4 (c). See also *Paul* v. *United States*, 371 U. S., at 253.

tions involving the two bases over which it exercises only concurrent jurisdiction upon that clause. In any event, we have now concluded that the District Court erred in ruling that the Twenty-first Amendment empowered the State Tax Commission to apply the markup to transactions between out-of-state distillers and nonappropriated fund activities located on the two exclusively federal enclaves. Our conclusion eliminates the essential premise of the District Court's decision concerning the two concurrent jurisdiction bases. While the arguments upon which the Government does rely with respect to the purchase of liquor destined for those two bases present, to be sure, only questions of law which we might now decide, we believe it would be useful to have the views of the District Court on these additional arguments, and we therefore remand the case to the District Court to allow it to consider initially the Government's instrumentality and Supremacy Clause arguments. Cf. *Lewis* v. *Martin*, 397 U. S. 552, 560 (1970); *FCC* v. *WJR*, 337 U. S. 265, 285 (1949).

The judgment of the District Court is vacated and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE REHNQUIST concurs, dissenting.

This is an amazing decision doing irreparable harm to the cause of States' rights under the Twenty-first Amendment. That Amendment gives the States pervasive control over the "transportation . . . into [the] State . . . for delivery or use therein of intoxicating liquors, in violation" of its laws. The liquors cannot reach these federal enclaves unless they are transported into or across the State and they are obviously delivered and used within Mississippi.

Two of the posts are inland enclaves within the State. Two are on Mississippi's coastline. But to reach the latter by water a vessel must enter Mississippi's territorial waters. As we held in *Skiriotes* v. *Florida*, 313 U. S. 69, the territorial waters are part of the domain over which the coastal State has sovereignty. These shipments therefore constitute "transportation or importation into" Mississippi for "delivery . . . therein of intoxicating liquors" within the meaning of the Twenty-first Amendment. The power of the State to bar the transportation of liquor into the State certainly includes the power to manage its distribution within the State. Mississippi has done no more than that. So it seems clear to me that this is a classic example of the exercise of basic States' rights under the Twenty-first Amendment.

Mississippi in her regulation of alcoholic beverages is a so-called monopoly State,[1] like 17 other States. Some of these monopoly States make themselves the exclusive wholesaler[2] of liquor and wine and exclusive retailer as well. Mississippi only makes itself the exclusive wholesaler. The sales involved in this litigation are wholesale sales to clubs of members of the Armed Services on four federal bases in Mississippi, over two of which Mississippi and the United States have concurrent jurisdiction, the United States having exclusive jurisdiction over the other two.

Under Mississippi law these post exchanges and other facilities (hereafter post exchanges) may order liquor direct from the distiller or from the state commission. The Mississippi regulation provides, "All orders of such organizations shall bear the usual wholesale

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[1] Miss. Code Ann. § 10265–01 *et seq.* (Supp. 1972).

[2] Wholesaler is defined as "any person, other than a manufacturer, engaged in distributing or selling any alcoholic beverage at wholesale for delivery within or without this State when such sale is for the purpose of resale by the purchaser." *Id.*, § 10265–05 (g).

markup [3] in price but shall be exempt from all state taxes." The wholesale markup on distilled spirits is 17% and on wine, 20%. If the purchase is made from the distiller, it remits the wholesale markup to the State. A distiller who fails or refuses to observe these conditions is deprived of the benefits of this state law and may be prosecuted.

This suit brought before a three-judge district court was to collect the amount of the markups paid by the post exchanges and to enjoin the enforcement of the Mississippi regulation against distillers or suppliers doing business with the post exchanges on the terms of Mississippi law. The three-judge District Court, relying on the Twenty-first Amendment,[4] gave appellees a summary judgment, 340 F. Supp. 903. Its judgment should be affirmed.

The four federal enclaves involved in this dispute are in the State of Mississippi. The spirits are made out of State and delivered to the post exchanges within the State. The question is whether the terms of the Twenty-first Amendment are met, that is to say, whether there is "transportation . . . into . . . [the] State . . . for delivery or use therein of intoxicating liquors."

The spirits are not all consumed on or at the post exchanges. Rather, they are resold to members of the Armed Services, to retired members and the families of members; and some of the spirits are consumed in Mississippi and outside the federal enclaves by guests of

[3] The Act provides in § 10265–106, "The Commission shall add to the cost of all alcoholic beverages such various markups as in its discretion will be adequate to cover the cost of operation of the State wholesale liquor business, yield a reasonable profit, and be competitive with liquor prices in neighboring states."

[4] It provides in § 2, "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the law thereof, is hereby prohibited."

members and retirees and their families. As the District Court said, the spirits are not brought into the federal enclaves for sole use there. The spirits are resold to individuals for their use or consumption either on the federal enclave or in the surrounding state area.

Private retailers in Mississippi pay the State a tax of $2.50 a gallon on distilled spirits. The Post Exchanges pay no state tax on their resales; and it is stipulated that these post exchanges each make a profit.

Section 6 of the Universal Military Training and Service Act, as amended in 1951, authorizes the Secretary of Defense to make regulations "governing the sale, consumption, possession of or traffic in . . . intoxicating liquors to or by members" of the Armed Forces "at or near any camp, station, post, or other place primarily occupied by [them]." 50 U. S. C. App. § 473. And it makes criminal, knowing violations of such regulations. Department of Defense Directive 1330.15 issued May 4, 1964, and amended June 9, 1966, provides that "the purchase of all alcoholic beverages for resale at any camp, post, station, base or other place primarily occupied by members of the Armed Forces within the United States shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered." The Act and the Department of Defense regulation do not on their face purport to override or displace state price control of liquor. It is said, however, that that is immaterial.

The Solicitor General relies on Art. I, § 8, cl. 17, of the Constitution, which empowers Congress to "exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." This provision, it is said, bars state price regulations as respects sales to post exchanges on the two federal enclaves

over which the United States has exclusive jurisdiction even in absence of a conflicting federal statute or regulation. Reliance is placed on *Paul* v. *United States,* 371 U. S. 245, 263–268. The *Paul* case did not involve the Twenty-first Amendment. There post exchanges resold milk and California provided minimum wholesale price regulations; and we held that Art. I, § 8, cl. 17, "by its own weight, bars state regulation without specific congressional action." *Id.,* at 263.

The Twenty-first Amendment and Art. I, § 8, cl. 17, are parts of the same Constitution. In *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U. S. 324, we held that while the Twenty-first Amendment gave the States control where otherwise the Commerce Clause would be a bar to its action (*id.,* at 330), the Twenty-first Amendment did not give a State the power to prohibit the passage of liquor through its territory for delivery to consumers in foreign countries. Congress had enacted a law governing traffic in liquor to foreign nations; and that aspect of the Commerce Clause gave Congress exclusive authority over foreign trade. Hence it is argued here that the power of Congress to exercise exclusive jurisdiction over a federal enclave pre-empts state power. But all that we have here is "transportation" into a State, not beyond it.

Collins v. *Yosemite Park & Curry Co.,* 304 U. S. 518, held as respects a *state regulatory regime* of alcoholic beverages within Yosemite National Park in California that the Twenty-first Amendment gave the State no power to supervise liquor transactions within the federal enclave. The Court said:

> "As territorial jurisdiction over the Park was in the United States, the State could not legislate for the area merely on account of the XXI Amendment. There was no transportation into California 'for delivery or use therein.' The delivery and use is

> in the Park, and under a distinct sovereignty. Where exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the XXI Amendment is not applicable." *Id.*, at 538.

That observation was apt, for California undertook to assert a regulatory authority within the park. The Solicitor General presses for an application of *Collins* to the present post exchanges. Yet Mississippi asserts no regulatory power over these military bases or over the dispensing of liquor by the post exchanges. Mississippi only collects a tax from out-of-state distillers and suppliers who ship liquor to the post exchanges. Those shipments, as noted, must enter Mississippi to reach the military bases.

Moreover, Mississippi asserts no authority to collect the tax from the Federal Government or its instrumentalities, the post exchanges. The legal incidence of the so-called sales tax is on the distributor only. The economic incidence is, of course, on the post exchanges. But it has long been held that there is no constitutional barrier to that result.

That raises the other phase of the case which should be decided here, as it is covered by our decisions and requires no additional factfindings for its resolution.

At least since *Alabama* v. *King & Boozer*, 314 U. S. 1, state taxes have been upheld on those doing business with the Federal Government even as respects cost-plus contracts where the terms of the contract forced their payment out of the federal treasury.[5] The principle of

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[5] In *New York* v. *United States*, 326 U. S. 572, in discussing the Federal Government's right to levy taxes on New York State's sale of mineral waters, the Court stated, "In the older cases, the emphasis was on immunity from taxation. The whole tendency of recent cases reveals a shift in emphasis to that of limitation upon immunity. They also indicate an awareness of the limited role of

King & Boozer permits no exception for distillers who make wholesale transactions with post exchanges, as the legal incidence of the tax is on the distillers, not on the

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courts in assessing the relative weight of the factors upon which immunity is based." *Id.*, at 581.

That trend continued in *Esso Standard Oil Co.*, v. *Evans*, 345 U. S. 495, where the Court upheld the validity of a state privilege tax on Esso, occasioned by its storage of gasoline owned by the United States, even though it was shown that the United States had contractually obligated itself to reimburse the contractor for any state tax liability incurred. The Court distinguished those cases which had held that there could be no state tax on federally owned property by indicating that in *Esso* the tax was on the privilege of storing Government property.

United States v. *City of Detroit*, 355 U. S. 466, and *United States* v. *Muskegon*, 355 U. S. 484, concerned the application of a 1953 Michigan statute providing that when tax-exempt real property is used by a private person in a business conducted for profit the private person is subject to taxation to the same extent as if he were the owner of the property. Both cases involved Government contractors occupying defense plants, one under a lease and the other under a permit which could be terminated at will. The Court upheld the imposition of the tax, saying the constitutional immunity of the Federal Government from state taxation was not violated and that the state statute was not discriminatory nor was the statute discriminatorily administered. This result was reached notwithstanding the fact that the Federal Government had for years reimbursed its contractors for the costs of possessory interest taxes.

In *City of Detroit* v. *Murray Corp.*, 355 U. S. 489, the Court upheld a tax imposed on Murray, an Air Force subcontractor, on the basis of work in process and inventory, title to which was in the Federal Government on the tax day. The Court found no constitutional impediment to permitting a possessory-interest tax on Government-owned personal property. Unlike the real property situation, the Michigan statute did not specifically authorize such tax, but it was imposed pursuant to the usual personal property tax statute, levying the tax on the property. In commenting on the disparity between the statutes, the Court stated, "It is true that the particular Michigan taxing statutes involved here do not expressly state that the person in possession is taxed 'for the privilege of using or possessing' personal property, but to strike down a tax on the possessor because of such a verbal omission would only prove a victory for empty

post exchanges. Moreover, the Buck Act, 54 Stat. 1059, now 4 U. S. C. § 105 *et seq.*, authorizes the application of state sales and use taxes to all post exchange purchases where "the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area." The Buck Act exempts from such taxes, sales, purchases, storage, or use of personal property sold by the United States or any instrumentality thereof to "any authorized purchaser" (§ 107), who is defined as one permitted to purchase at commissaries, ship's stores, post exchanges, and the like, by regulations of the departmental Secretary.

It also does not authorize "the levy or collection of any tax on or from the United States or any instrumentality thereof." 4 U. S. C. § 107 (a).

The markup which the State requires wholesalers of liquor to make is in its worst light a sales tax. There is no "levy or collection" by the State from a post exchange in any technical, legal sense. As noted, the economic but not the legal incidence of the tax is in the post exchanges. The post exchange is merely paying indirectly the cost of doing business in the manner in which *King & Boozer* held that there was no constitutional immunity from state taxation.

That alone is sufficient to distinguish the present case from *Paul* v. *United States*, 371 U. S. 245, where state minimum price regulations were held to be inoperative as applied to purchases of milk by federal instrumentalities, such as post exchanges. *Paul* in other words involved no tax at all. The levy of Mississippi on wholesalers is, as noted, a sum designed to cover the cost to the State of operating the wholesale liquor business, yield a reasonable profit, and be competitive with liquor prices in

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formalisms. And empty formalisms are too shadowy a basis for invalidating state tax laws. . . . In the circumstances of this case the State could obviate such grounds for invalidity by merely adding a few words to its statutes." *Id.*, at 493.

neighboring States. It is plainly, therefore, a tax on sales and in my view authorized by Congress under the Buck Act. The Solicitor General concedes in his brief that the Mississippi regulation is meant only "to raise revenue." By reason of the Buck Act it matters not, therefore, that the post exchanges, as held in *Paul*, are federal instrumentalities. Here, as in *King & Boozer*, we deal only with the "economic" burden of the local tax, its legal incidence being solely on the distributor.

First Agricultural National Bank v. *State Tax Comm'n*, 392 U. S. 339, is inapposite. In that case Congress had specifically provided four ways in which the States could tax national banks, apart from taxes on their real estate. *Id.*, at 341–342. Efforts to allow broader taxation were defeated in Congress. Because of that history, we read the Massachusetts sales tax closely and noting that the tax was " 'recoverable at law' " from the national bank, *id.*, at 347, held that it transcended the congressional waiver of immunity.

That case does not control here for two reasons.

First, the legal incidence of the present tax is not in the post exchanges, only the economic incidence.

Second, the Massachusetts sales tax had no relation to the Twenty-first Amendment. The present case involves "transportation or importation" of liquor into the State of Mississippi over which the State has plenary control. The State, having the power to bar liquor completely from Mississippi, can admit it on such terms and conditions as she chooses. If she sought to levy a tax on the post exchanges a different issue would arise. But there is no federal immunity against including state costs in federal contracts.

While the Buck Act by § 107 (a) bars a state tax on federal instrumentalities—which as *Paul* holds includes post exchanges—*King & Boozer* allows a state tax on those who, like the wholesalers in this case, do business with the United States. *King & Boozer*, decided in 1941,

after the Buck Act, stated the modern version of the scope of intergovernmental immunity.[6] The present case is therefore on all fours with the excise tax imposed by Florida on milk distributors who in turn sold to federal enclaves. In referring to the Buck Act we said:

> "We think this provision provides ample basis for Florida to levy a tax measured by the amount of milk Polar distributes monthly, including milk sold to the United States for use on federal enclaves in Florida." *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U. S. 361, 383.

The judgment below should be affirmed.

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[6] During the first third of this century the doctrine of intergovernmental immunity, as it applies to state taxation of allegedly federal governmental activities, went through a highly expansive phase. Among the taxes held invalid were the following: sales tax on articles sold to the Government, *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218; income tax on earnings from patents and copyrights, *Long* v. *Rockwood*, 277 U. S. 142; income tax on income derived by lessees of public lands, *Gillespie* v. *Oklahoma*, 257 U. S. 501.

At the same time, however, a number of inroads or qualifications on the doctrine were established. Among the taxes held valid were the following: corporate franchise tax measured by income including that from Government bonds, *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; inheritance or estate tax measured in part by Government bonds, *Plummer* v. *Coler*, 178 U. S. 115; income tax on capital gain on resale of Government bonds, *Willcuts* v. *Bunn*, 282 U. S. 216; income tax on net income of contractors with the Government, *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514. This trend culminated in the decision of the Court in *Alabama* v. *King & Boozer*, 314 U. S. 1.

That trend led a commentator to note, "Today, the United States conducts much of its business through a vast number of private parties. The trend in the U. S. Supreme Court has been to reject immunizing these private parties from non-discriminatory state taxes, as a matter of constitutional law, even though the United States bears the economic brunt of the tax, indirectly in some instances, by inclusion in price, and more directly in many instances, by reimbursement to the contractor as an item of cost." Rollman, Recent Developments in Sovereign Immunity of the Federal Government from State and Local Taxes, 38 N. D. L. Rev. 26, 30.

UNITED STATES *v.* MASON, ADMINISTRATOR, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

No. 72–654. Argued April 18, 1973—Decided June 4, 1973*

The United States did not breach its fiduciary duty as trustee of Indian property by paying the Oklahoma inheritance tax assessed against the estate of decedent, a restricted Osage Indian, in reliance on *West* v. *Oklahoma Tax Comm'n*, 334 U. S. 717, which had upheld the validity of that tax as applied to the same kind of estate. Pp. 394–400.

198 Ct. Cl. 599, 461 F. 2d 1364, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., concurred in the result.

Solicitor General Griswold argued the cause for the United States in No. 72–654. With him on the brief were *Assistant Attorney General Frizzell, Deputy Solicitor General Lacovara, Harry R. Sachse, Edmund B. Clark,* and *Carl Strass. Paul C. Duncan,* Assistant Attorney General of Oklahoma, argued the cause for petitioner in No. 72–606. With him on the brief was *Larry Derryberry,* Attorney General.

Charles A. Hobbs argued the cause for respondents in both cases. With him on the brief was *Pierre J. LaForce.*†

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The issue in these cases is whether a trustee in the course of administering its fiduciary obligations is en-

*Together with No. 72–606, *Oklahoma* v. *Mason, Administrator, et al.*, also on certiorari to the same court.

†*David H. Getches* filed a brief for Native American Rights Fund as *amicus curiae* urging affirmance in No. 72–654.

titled to rely on a directly relevant decision of this Court which has neither been overruled nor questioned. The Court of Claims ruled that the United States breached its fiduciary duty by failing to resist payment of Oklahoma's estate tax on certain trust property held by the United States acting as trustee for the benefit of the Osage Indians. The Court of Claims recognized that this Court, in *West* v. *Oklahoma Tax Comm'n*, 334 U. S. 717 (1948), had squarely upheld the validity of Oklahoma's inheritance tax as applied to restricted Osage Indians. But the lower court believed that *West* had been so undermined by later decisions of this and other courts that the United States had an obligation to challenge its continuing validity. Since the court also believed that such a challenge would have been successful, it upheld both the plaintiffs' claim against the United States for the amount of the tax and the United States' third-party claim against Oklahoma for indemnification. We reverse. We hold that the United States was entitled to rely on *West* in paying the tax and thus did not breach its fiduciary obligations. It follows that the plaintiffs below suffered no compensable damages and that the claim over by the United States drops out of the case.

I

The facts and legal background of this dispute may be briefly stated. Before 1906, the Osage Reservation was held in trust for the Osage Tribe by the United States.[1] In that year, the Osage Allotment Act, 34 Stat.

[1] The land in question originally belonged to the Cherokee Nation, but in 1866, the Cherokees entered a treaty with the United States authorizing the United States to settle friendly Indians in Cherokee territory. See 14 Stat. 799. Pursuant to this treaty, the Osage Indians settled the land in question, and in 1883, the Cherokees conveyed the area to the United States to be held in trust for the

539, was passed, which divided tribal land equally among members of the Tribe. However, an individual Indian was not permitted to alienate the land unless "the Secretary of the Interior, in his discretion, . . . [issued] . . . a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this Act." [2] 34 Stat. 542.[3] In addition, the Act created so-called "headrights" which are each tribal member's individual share of the income derived from the minerals located on the land. The minerals and this income were to be placed in trust for the individual tribal members, subject to periodic distribution from income, until 1984, when legal title to the minerals together with the accumulated income would vest in the individual Indians.[4] Various tribal funds were also placed in trust until that year. As amended, the Act provides that land and funds which are either restricted or held in trust "shall not be subject to lien, levy, attachment, or forced sale . . . prior to the issuance of a certificate of competency." 61 Stat. 747.

The decedent in this case, Rose Mason, was an Osage Indian who had not received a certificate of competency. Pursuant to the Osage Allotment Act, the United States held certain of her property in trust for her. Upon

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Osage Indians. See *West* v. *Oklahoma Tax Comm'n*, 334 U. S. 717, 720 (1948).

[2] The Act followed the pattern of the General Allotment Act of 1887, 24 Stat. 388, 25 U. S. C. § 331, which empowered the President to allot reservation land to certain Indians, but from which the Osage Indians were omitted.

[3] The Act has been frequently amended. 78 Stat. 1008; 61 Stat. 747; 52 Stat. 1034; 45 Stat. 1478; 37 Stat. 86.

[4] Originally, the Act provided that the property in question would vest in the Indians in 25 years. See 34 Stat. 544. However, an amendment was passed in 1938 extending the trust period to 1984. See 52 Stat. 1035.

her death intestate, an Oklahoma estate tax return was filed which included in her gross estate these trust properties. The Federal Government then paid Oklahoma some $8,087.10 in estate taxes out of the trust properties. Although the decedent's administrators were discharged in 1968, in 1970 the estate was reopened for the purpose of permitting the administrators to challenge the United States' payment of the tax. A suit was filed in the Court of Claims alleging that the United States had breached its fiduciary duty in making the payment,[5] and that court upheld the claim together with the United States' third-party claim against Oklahoma. See 198 Ct. Cl. 599, 461 F. 2d 1364 (1972). We granted certiorari because of the seeming inconsistency between the decision below and our prior decision in *West* v. *Oklahoma Tax Comm'n, supra.*[6] 409 U. S. 1124.

II

In *Oklahoma Tax Comm'n* v. *United States,* 319 U. S. 598 (1943), this Court ruled that it could not infer a tax immunity extending to estate taxes on Osage property from the fact that Congress had placed restrictions on the alienability of the property. The *West* Court extended that ruling to property, such as that involved in this case, held in trust for the Osage Indians. The Court held that by placing the property in trust, Con-

[5] The suit was brought under 28 U. S. C. § 1491, which gives the Court of Claims jurisdiction "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

[6] Both the United States, as defendant below, and Oklahoma, as third-party defendant below, petitioned for certiorari. We granted both petitions, cf. 41 U. S. C. § 114 (b), and consolidated the cases.

gress did not intend to immunize it from local taxation. Moreover, the federal-instrumentality doctrine was found to be no bar to Oklahoma's estate tax. Although this doctrine had been used in earlier cases to invalidate state property taxes on trust property, see, *e. g., McCurdy* v. *United States,* 264 U. S. 484 (1924); *United States* v. *Rickert,* 188 U. S. 432 (1903), the Court distinguished estate taxes since "[a]n inheritance or estate tax is not levied on the property of which an estate is composed. Rather it is imposed upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits." 334 U. S., at 727. Discerning no congressional intent to immunize Osage trust property from state taxation and no constitutional bar to the tax, the Court upheld Oklahoma's claim.

As the Court of Claims itself recognized, the *West* decision "applied to the very type of trust property now before us." 198 Ct. Cl., at 609, 461 F. 2d, at 1370. Nonetheless, the court thought that the rationale of *West* had been substantially undermined by *Squire* v. *Capoeman,* 351 U. S. 1 (1956), which held that the profits from the sale of timber on the land of a Quinaielt Indian held in trust for him pursuant to the General Allotment Act, 25 U. S. C. § 331, was immune from federal capital gains taxes.

It must be noted, however, that the *Squire* Court did not purport to question or overrule *West,* and, indeed, did not so much as mention that decision. The *Squire* case involved a different tax by a different level of government on the trust properties of a different tribe held pursuant to a different statute. As the *West* decision itself made clear, decisions relating to other types of taxes are not readily transferable to the area of estate and gift taxation where the tax is imposed on the transfer of property rather than on the property itself or the

income it generates. Cf. *Plummer* v. *Coler*, 178 U. S. 115 (1900). Moreover, the *Squire* decision rested heavily on the provision in the General Allotment Act providing for the removal of "all restrictions as to sale, encumbrance, or taxation" when Indian property is granted in fee—a provision which has no analogue in the Osage Allotment Act insofar as these trust properties are concerned.[7]

Nor can we agree with the Court of Claims that the foundations of *West* have been substantially weakened by subsequent lower court decisions. Apart from our difficulty in comprehending how decisions by lower courts can ever undermine the authority of a decision of this Court, we think it clear that each of the cases relied upon below is distinguishable from *West*. Thus, while it is true that the Ninth Circuit construed the Mission Indian Act, 26 Stat. 712, to invalidate California's estate tax as applied to a California Mission Indian in *Kirkwood* v. *Arenas*, 243 F. 2d 863 (CA9 1957), the *Kirkwood* court carefully distinguished *West* and recognized its continuing validity. See *id.*, at 865. Similarly, the Court of Claims' reliance on its own decision in *Big Eagle* v. *United States*, 156 Ct. Cl. 665, 300 F. 2d 765 (1962), is misplaced since that decision, like *Squire*, con-

[7] Respondents argue before this Court that our recent decision in *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164 (1973), substantially extended the protection afforded Indian tribes against state taxation and therefore undermined *West*. *McClanahan*, however, concerned a state income tax on the income of a reservation Indian which was earned within the reservation—a situation wholly different from that presented here. Moreover, *McClanahan* cited *Oklahoma Tax Comm'n* v. *United States*, 319 U. S. 598 (1943), the predecessor of *West*, with approval, and specifically distinguished the case of the Osage Indians by holding that "the [Indian sovereignty] doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community." 411 U. S., at 171.

cerned a federal income tax. See also *United States* v. *Hallam,* 304 F. 2d 620 (CA10 1962). And cases such as *Nash* v. *Wiseman,* 227 F. Supp. 552 (WD Okla. 1963), and *Asenap* v. *United States,* 283 F. Supp. 566 (WD Okla. 1968), are of questionable relevance, since they arose under the General Allotment Act rather than the Osage Allotment Act. Cf. Rev. Rul. 69–164, 1969–1 Cum. Bull. 220.[8]

Thus, as the Court of Claims itself conceded, "since the *West* case in 1948, there has been no holding exactly on the precise issue now before us—the liability of such Osage property to state death taxation." 198 Ct. Cl., at 613, 461 F. 2d, at 1372. Although it might be fair to say that over the years the fringes of the *West* doctrine have been worn away, its core holding remains unimpeached by any decisions of this or any other court.

We need not decide, however, whether in a case squarely presenting the issue, we would continue to adhere to *West.* For the issue in this case is not whether *West* should be overruled, but rather whether the United States breached its fiduciary duty in failing to anticipate that it would be overruled. Cf. *Helvering* v. *Griffiths,* 318 U. S. 371, 394 (1943).[9]

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[8] The Court of Claims relied in part upon a Technical Advice Memorandum issued by the Internal Revenue Service to the Oklahoma District Director of Internal Revenue on August 15, 1969. The Memorandum announced that, henceforth, Osage trust property would be exempt from federal estate taxation. The court also pointed to *Beartrack* v. *United States,* Ct. Cl. No. 281–67, in which the United States settled a suit for refund of federal estate taxes paid on restricted trust properties. It is obvious, however, that Internal Revenue Service decisions as to the scope of its own taxing power have no effect on the taxing power of the States.

[9] As all parties apparently recognize, the scope of the United States' fiduciary duty in administering the trust property is a question of federal law. Cf. *Clearfield Trust Co.* v. *United States,* 318 U. S. 363 (1943).

When the question is so posed, we think that the answer is obvious. There is no doubt that the United States serves in a fiduciary capacity with respect to these Indians and that, as such, it is duty bound to exercise great care in administering its trust. See, *e. g., Seminole Nation* v. *United States,* 316 U. S. 286, 296–297 (1942). But it has long been recognized that a trustee is not an insurer of trust property. As Professor Scott has written, "A trustee is under a duty in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property." 2 A. Scott, Trusts 1408 (3d ed. 1967) (hereinafter cited as Scott). See, *e. g., Phelps* v. *Harris,* 101 U. S. 370, 383 (1880). It follows that "[i]f the trust property is lost or destroyed or diminished in value, the trustee is not subject to a surcharge unless he failed to exercise the required care and skill." 2 Scott 1419.

Applying these familiar principles to the facts before us, we are required to decide whether the United States can be said to have acted with less than the requisite care in refusing to contest the Oklahoma tax. When the State asserts a doubtful tax claim against trust property, the trustee is often presented with a close question. Normally, the trustee is obligated to pay taxes on the trust estate, and, indeed, if he negligently fails to do so, he may be held liable for any resulting penalty. See, *e. g.,* 2 Scott 1422. Yet, as these cases demonstrate, if he pays the tax, he may similarly be called upon to reimburse the trust estate for the amount of the tax.

In order to avoid placing a trustee on the horns of this dilemma, most courts which have considered the problem have given a trustee broad discretion to pay taxes claimed by the State so long as the trustee's judgment that the taxes are valid or that the costs and risks of litigation outweigh the advantages is not wholly unrea-

sonable. See, *e. g., Crutcher* v. *Joyce,* 146 F. 2d 518, 519 (CA10 1945); *In re Estate of Miller,* 259 Cal. App. 2d 536, 550, 551, 66 Cal. Rptr. 756, 766 (1968); *In re Estate of Wehrhane,* 41 N. J. Super. 158, 166, 124 A. 2d 334, 338 (1956); *Henshie* v. *McPherson & Citizens State Bank,* 177 Kan. 458, 479, 280 P. 2d 937, 953 (1955); *In re Vanderbilt's Will,* 190 Misc. 824, 850, 77 N. Y. S. 2d 403, 427 (1948); *Selleck* v. *Hawley,* 331 Mo. 1038, 1056–1057, 56 S. W. 2d 387, 395–396 (1932).

Thus, even if the *West* case had never been decided, the plaintiffs below would still have had difficulty in making out a case that the United States had breached its fiduciary duty by paying the tax. But, of course, *West* had been decided at the time the tax was paid, and we therefore deal here with an assertion of taxing authority which was not merely plausible but had been expressly approved by a decision of this Court. Generally, when a trustee is in doubt as to what course to pursue, the proper procedure for him to follow is to conform his conduct to the instructions given him by the courts. See, *e. g., Mosser* v. *Darrow,* 341 U. S. 267, 274 (1951). Here, the United States did just that, and plaintiffs below ask us to find that obedience to the instructions of this Court constitutes a breach of fiduciary duty.

It is, of course, true that Supreme Court decisions are on occasion overruled and that the opportunity to overrule them would never arise if litigants did not continue to challenge their validity. But, in this context at least, it is unnecessary to penalize the United States' proper reliance on our past decisions in order to re-examine them, since there is no bar to a suit by plaintiffs below directly against Oklahoma for recovery of the tax. Cf. *Poafpybitty* v. *Skelly Oil Co.,* 390 U. S. 365 (1968). And if the doctrine of *stare decisis* has any meaning at all, it requires that people in their everyday affairs be

able to rely on our decisions and not be needlessly penalized for such reliance. Cf. *Flood* v. *Kuhn*, 407 U. S. 258, 283 (1972); *Wallace* v. *M'Connell*, 13 Pet. 136, 150 (1839).

We do not have to say that a fiduciary may never be held liable for reliance on prior decisions of this Court. But, as the discussion above demonstrates, the United States' reliance on *West* was reasonable in this situation. The *West* decision has neither been overruled nor questioned in our subsequent cases. It is fully consistent with later developments and has been followed without protest for 24 years. Since we find that the United States acted with the requisite care and prudence in following *West*, the decision below must be reversed with instructions to enter judgment dismissing the complaint.

So ordered.

MR. JUSTICE DOUGLAS concurs in the result.

Syllabus

UNITED STATES *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD CO.

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

No. 72-90. Argued February 26, 1973—Decided June 4, 1973

In this refund suit, respondent railroad seeks to recover an alleged income tax overpayment resulting from its failure to take deductions for depreciation with respect to the cost of facilities constructed at highway-railroad intersections and elsewhere that were paid for, not by respondent, but out of Government funds appropriated to further public safety and improve highway systems. Respondent claimed that the subsidies qualified as contributions to its capital by a nonshareholder under § 113 (a) (8) of the Internal Revenue Code of 1939, thereby permitting respondent to depreciate the Government's cost in the assets. The Court of Claims ruled that respondent was entitled to the claimed depreciation deduction. *Held:* The governmental subsidies did not constitute contributions to respondent's capital within the meaning of § 113 (a) (8); the assets in question have a zero basis; and respondent cannot claim a depreciation allowance with respect to those assets. As can be gleaned from *Detroit Edison Co.* v. *Commissioner*, 319 U. S. 98, and *Brown Shoe Co.* v. *Commissioner*, 339 U. S. 583, to qualify as a nonshareholder contribution to capital, the asset must become a permanent part of the transferee's working capital structure; may not be compensation for the transferee's services; must be bargained for; must benefit the transferee commensurately with its value; and ordinarily will be used to produce additional income. Here, almost none of these criteria was met, since the facilities were not bargained for and, but for the governmental subsidies, would not have been constructed. No substantial incremental benefit in terms of income production was considered at the time the facilities were transferred, and such minor benefit as may have accrued to respondent from the facilities was merely peripheral to the railroad's business. Nor would respondent's asserted obligation to replace the facilities warrant the claimed depreciation. Pp. 405–416.

197 Ct. Cl. 264, 455 F. 2d 993, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and REHNQUIST,

JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 416. STEWART, J., filed a dissenting opinion, in which DOUGLAS, J., joined, *post*, p. 417. POWELL, J., took no part in the consideration or decision of the case.

Richard B. Stone argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Acting Assistant Attorney General Ugast, Meyer Rothwacks,* and *Grant W. Wiprud.*

Richard J. Schreiber argued the cause for respondent. With him on the brief was *Richard T. Cubbage.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The issue in this federal income tax case is whether the respondent, Chicago, Burlington & Quincy Railroad Company (CB&Q), an interstate common carrier railroad, may depreciate the cost of certain facilities paid for prior to June 22, 1954, not by it or by its shareholders, but from public funds.

Starting about 1930, CB&Q entered into a series of contracts with various Midwestern States. By these agreements the States were to fund some or all of the costs of construction of specified improvements, and the railroad apparently was to bear, at least in part, the costs of maintenance and replacement of the improvements once they had been installed. In 1933, as part of the program of the National Industrial Recovery Act, 48 Stat. 195, Congress authorized federal reimbursement to the States of the shares of the costs the States incurred in the construction of those improvements that inured to the benefit of public safety and improved highway traffic control.[1] In 1944 Congress went further and authorized reimbursement, with stated limitations, to the States for the entire cost of the improvements, subject to the con-

[1] National Industrial Recovery Act, § 204 (a) (1), 48 Stat. 203.

dition that a railroad that received a benefit from a facility so constructed was liable to the Government for up to 10% of the cost of the project pro rata in relation to the benefit received by the railroad.[2]

Under these programs CB&Q received, at public expense, highway undercrossings and overcrossings having a cost of $1,538,543; crossing signals, signs, and floodlights having a cost of $548,877; and jetties and bridges having a cost of $58,721.[3] These improvements, aggregating $2,146,141, were carried on the railroad's books as capital assets even though most of the agreements between CB&Q and the several States did not expressly convey title to the railroad.

CB&Q instituted a timely suit in the Court of Claims alleging, among other things, that it had overpaid its 1955 federal income tax because it had failed to assert, as a deduction on its return as filed, allowable depreciation on the subsidized assets.[4] By a 4-to-3 decision on this issue (only one of several in the case), the Court of Claims concluded that, under § 167 of the Internal Revenue Code of 1954, 26 U. S. C. § 167, CB&Q was entitled to the depreciation deduction it claimed. This was on the theory that the subsidies qualified as contributions to the railroad's capital under §§ 362 and 1052 (c) of that

[2] Federal-Aid Highway Act of 1944, § 5, 58 Stat. 840.

[3] The Court of Claims, both the majority and dissenters, asserted, and indeed found, that the $1,538,543 figure related to highway undercrossings and overcrossings. 197 Ct. Cl. 264, 271–272, 325, 455 F. 2d 993, 997–998 (1972). CB&Q, in its Brief, p. 3, and in oral argument, Tr. of Oral Arg. 25, claims that this figure has to do only with railroad bridges and that the assets sought to be depreciated relate only to railroad use. According to CB&Q, no facilities directly related to highway use are involved. Inasmuch as the resolution of this factual issue would not affect the result we reach, it need not be resolved.

[4] The parties are in agreement as to what the adjusted bases of the assets in question would be, and as to the applicable rates of depreciation, if depreciation for tax purposes is allowable at all.

Code, 26 U. S. C. §§ 362 and 1052 (c), and under § 113 (a)(8) of the Internal Revenue Code of 1939.

In arriving at this conclusion, the Court of Claims majority relied on *Brown Shoe Co.* v. *Commissioner*, 339 U. S. 583 (1950), and reasoned that, even though the governmental payments for the facilities may not have been intended as contributions to the railroad's capital, the "principal purpose" being, instead, "to benefit the community-at-large," 197 Ct. Cl., at 276, 455 F. 2d, at 1000, the facilities did in fact enlarge the railroad's working capital, were used in its business, and produced economic benefits for it, thereby qualifying as contributions to its capital under the cited section of the 1939 Code. The three dissenting judges disagreed with this interpretation of *Brown Shoe*, and, instead, relied on *Detroit Edison Co.* v. *Commissioner*, 319 U. S. 98 (1943). They concluded that the critical features were the donor's attitude, purpose, and intent, and that, with governmental payments, there could be no intention to confer a benefit upon CB&Q. Instead, as the findings revealed,[5] the intention was to expedite traffic flow and to improve public safety at highway-railroad crossings. 197 Ct. Cl., at 315, 320, 455 F. 2d, at 1023, 1026.

Because the Court of Claims decision apparently would afford a precedent for the tax treatment of substantial sums,[6] we granted certiorari. 409 U. S. 947.

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[5] The Trial Commissioner and the Court of Claims made the following finding of fact:

"9. The facilities noted in finding 7 were constructed primarily for the benefit of the public to improve safety and to expedite highway traffic flow. Plaintiff [CB&Q], however, received benefits from the facilities, among others, probable lower accident rates, reduced expenses of operating crossing facilities, and, where permitted, higher train speed limits, all of which permitted plaintiff to function more efficiently and presumably less expensively." 197 Ct. Cl., at 326–327.

[6] The Solicitor General asserts, Pet. for Cert. 15–16, that $623,000,000 in federal funds were paid out for projects and im-

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Section 23 (*l*) of the 1939 Code and its successor, § 167 (a) of the 1954 Code, 26 U. S. C. § 167 (a), allow a taxpayer "as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear . . . of property used in the trade or business." In the usual situation the taxpayer himself incurs cost in acquiring the assets as to which the depreciation deduction is asserted.[7] But there are other and different situations formally recognized in the governing tax statutes. A familiar example is gift property.[8] Another is property acquired by a cor-

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provements at railroad-highway grade crossings alone between 1934 and 1954. See U. S. Department of Transportation, Report to Congress: Railroad-Highway Safety, Part I: A Comprehensive Statement of the Problem 38 (1971). The Commissioner of Internal Revenue estimates that, taking into account grants of this kind to railroads and federal grants to utility companies, depreciation on property with asserted cost bases between a half billion and one billion dollars is dependent upon the resolution of this issue and is still litigable. Pet. for Cert. 16.

[7] Section 113 (a) of the 1939 Code and § 1012 of the 1954 Code, 26 U. S. C. § 1012, state the general rule that the "basis of property shall be the cost of such property."

[8] Section 113 (a)(2) of the 1939 Code provides that with respect to "property . . . acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift, except . . . ." This provision was carried over into § 1015 (a) of the 1954 Code, 26 U. S. C. § 1015 (a). The language of § 362 (c) of the 1954 Code, to the effect that the basis of a nonshareholder's contribution made on or after June 22, 1954, to the capital of a corporation shall be zero in the hands of the transferee, has been said not to affect the availability of a carryover basis with respect to gifts. See H. R. Rep. No. 1337, 83d Cong., 2d Sess., A128 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess., 272 (1954); B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders ¶ 3.14, pp. 3–51 and n. 81 (3d ed. 1971); 3A J. Mertens, Law of Federal Income Taxation § 21.134 (1968 rev.).

poration from its shareholders as paid-in surplus or as a contribution to capital.[9] Another, and the one that is pertinent here, is covered by § 113 (a)(8) [10] of the 1939 Code and by the contrasting provisions of §§ 362 (a) and (c) of the 1954 Code, 26 U. S. C. §§ 362 (a) and (c).[11]

[9] Section 113 (a)(8) of the 1939 Code; § 362 (a) of the 1954 Code, 26 U. S. C. § 362 (a).

[10] "§ 113. Adjusted basis for determining gain or loss.

"(a) Basis (unadjusted) of property.

"The basis of property shall be the cost of such property; except that—

. . . . .

"(8) Property acquired by issuance of stock or as paid-in surplus.

"If the property was acquired after December 31, 1920, by a corporation—

"(A) by the issuance of its stock or securities in connection with a transaction described in section 112 (b)(5) (including, also, cases where part of the consideration for the transfer of such property to the corporation was property or money, in addition to such stock or securities), or

"(B) as paid-in surplus or as a contribution to capital, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made."

[11] "§ 362. Basis to corporations.

"(a) Property acquired by issuance of stock or as paid-in surplus.

"If property was acquired on or after June 22, 1954, by a corporation—

"(1) in connection with a transaction to which section 351 (relating to transfer of property to corporation controlled by transferor) applies, or

"(2) as paid-in surplus or as a contribution to capital, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain recognized to the transferor on such transfer.

. . . . .

"(c) Special rule for certain contributions to capital.

"(1) Property other than money.

[*Footnote 11 continued on p. 407*]

This concerns a contribution to capital by a nonshareholder. See Treas. Reg. 111, § 29.113 (a)(8)–1 (1943). Under §§ 113 (a)(8) and 114 (a) of the earlier Code, the nonshareholder-contributed asset in the hands of the receiving corporation had the same basis, subject to adjustment, for depreciation purposes as it had in the hands of the transferor; under the 1954 Code, however, its basis for the transferee is zero.

Pertinent to all this is the Court's decision in *Edwards* v. *Cuba R. Co.*, 268 U. S. 628 (1925). The Court there held that subsidies granted by the Cuban Government to a railroad to promote construction in Cuba "were not profits or gains from the use or operation of the railroad," and did not constitute income to the receiving corporation. *Id.*, at 633. The holding in *Edwards*, taken with § 113 (a)(8) of the 1939 Code, produced a seemingly anomalous result, for it meant that a corporate taxpayer receiving property from a nonshareholder as a contribution to capital not only received the property free from income tax but was allowed to assert a deduction for depreciation on the asset so received tax free. This result also ensued under the Court's holding in *Brown Shoe* and led to the enactment of the zero-basis

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"Notwithstanding subsection (a)(2), if property other than money—

"(A) is acquired by a corporation, on or after June 22, 1954, as a contribution to capital, and

"(B) is not contributed by a shareholder as such, then the basis of such property shall be zero.

"(2) Money.

"Notwithstanding subsection (a)(2), if money—

"(A) is received by a corporation, on or after June 22, 1954, as a contribution to capital, and

"(B) is not contributed by a shareholder as such, then the basis of any property acquired with such money during the 12-month period beginning on the day the contribution is received shall be reduced by the amount of such contribution."

provision, referred to above, in § 362 (c) of the 1954 Code, 26 U. S. C. § 362 (c). *Veterans Foundation* v. *Commissioner*, 317 F. 2d 456, 458 (CA10 1963).

CB&Q argues that this very result should follow here. It is said that the railroad received no taxable income and incurred no income tax liability when it received, at governmental expense prior to June 22, 1954, the facilities as to which CB&Q now asserts depreciation. And, in providing the facilities, CB&Q argues, the Government intended to make a contribution to the railroad's capital, within the meaning of § 113 (a)(8), thereby permitting CB&Q to depreciate the Government's cost in the assets. Whether the governmental subsidies qualified as income to the railroad is an issue not raised in this case, and we intimate no opinion with respect to it. The United States, however, asserts that the subsidies did not constitute a "contribution to capital" under § 113 (a)(8), and that, accordingly, the transferee railroad's tax basis is zero and no depreciation deduction is available.

Our inquiry, therefore, is a narrow one: whether the nonshareholder payment in this case constituted a "contribution to capital," within the meaning of § 113 (a)(8). Because both *Detroit Edison* and *Brown Shoe* bear upon the issue, we turn to those two decisions.

II

Detroit Edison concerned customers' payments to a utility for the estimated costs of construction of service facilities (primary power lines) that the utility otherwise was not obligated to provide. For its tax years 1936 and 1937, to which the Revenue Act of 1936, 49 Stat. 1648, applied, the utility claimed the full cost of the facilities in its base for computing depreciation. The Commissioner disallowed, for depreciation purposes, that portion of the cost paid by customers and not refundable. The Board of Tax Appeals, 45 B. T. A. 358 (1941), and the

Court of Appeals, 131 F. 2d 619 (CA6 1942), sustained the Commissioner. This Court affirmed.

Mr. Justice Jackson, speaking for a unanimous Court (the Chief Justice not participating), observed, "The end and purpose of it all [depreciation] is to approximate and reflect the financial consequences to the taxpayer of the subtle effects of time and use on the value of his capital assets." 319 U. S., at 101. The statute, § 113 (a) of the 1936 Act, it was said, "means . . . cost to the taxpayer," even though the property "may have a cost history quite different from its cost to the taxpayer." Also, the "taxpayer's outlay is the measure of his recoupment through depreciation accruals." 319 U. S., at 102. The utility's attempt to avoid this result by its contention that the payments were gifts or contributions to its capital, and entitled to the transferors' bases, was rejected.

> "It is enough to say that it overtaxes imagination to regard the farmers and other customers who furnished these funds as makers either of donations or contributions to the Company. The transaction neither in form nor in substance bore such a semblance.
>
> "The payments were to the customer the price of the service. . . . They have not been taxed as income. . . . But it does not follow that the Company must be permitted to recoup through untaxed depreciation accruals on investment it has refused to make." *Id.*, at 102–103.

Detroit Edison, by itself, would appear almost to foreclose CB&Q's claims here, for there is an obvious parallel between the customers' payment for the utility service facilities in *Detroit Edison*, and the governmental payments for improvements to the railroad's service facilities in the case before us.

But *Detroit Edison* was not the last word. *Brown Shoe* was decided seven years later, and the opposite tax result was reached by an 8–1 vote of the Court, with Mr. Justice Black in dissent without opinion.

Brown Shoe concerned a corporate taxpayer's excess profits tax, under the Second Revenue Act of 1940, 54 Stat. 974, as amended, for its fiscal years 1942 and 1943. Community groups paid cash or transferred property to the taxpayer as an inducement for the location or expansion of factory operations in their communities. Contracts were entered into, and in each instance the taxpayer obligated itself to locate or enlarge a facility in the community and to operate it for at least a minimum term. The value of the payments and transfers was the focus of the controversy between the taxpayer and the Commissioner, for depreciation on the transferred assets was claimed and their inclusion in equity invested capital was asserted. The Tax Court overruled the Commissioner's disallowance with respect to the acquisitions paid for with cash, but sustained the Commissioner with respect to buildings transferred. 10 T. C. 291 (1948). The Court of Appeals upheld the Commissioner on both items. 175 F. 2d 305 (CA8 1949). This Court reversed.

Mr. Justice Clark, writing the opinion for the majority of the Court, concluded that the assets transferred by the community groups to the taxpayer were contributions to capital, within the meaning of § 113 (a)(8) of the 1939 Code. The Court noted that in time they would wear out and, if the taxpayer continued in business, the physical plant eventually would have to be replaced. *Detroit Edison* was cited and recognized, but was considered not to be controlling. In *Brown Shoe* there were "neither customers nor payments for service," and therefore the Court "may infer a different purpose in the transactions between petitioner and the community groups." 339 U. S., at 591. The only expectation of the groups

was that "such contributions might prove advantageous to the community at large." Thus, it was said, "the transfers manifested a definite purpose to enlarge the working capital of the company." *Ibid.*

The Court thus professed to distinguish and not at all to overrule *Detroit Edison*. It did so on an analysis of the purposes behind the respective transfers in the two cases. Where the facts were such that the transferors could not be regarded as having intended to make contributions to the corporation, as in *Detroit Edison*, the assets transferred were not depreciable. But where the transfers were made with the purpose, not of receiving direct service or recompense, but only of obtaining advantage for the general community, as in *Brown Shoe*, the result was a contribution to capital.

III

It seems fair to say that neither in *Detroit Edison* nor in *Brown Shoe* did the Court focus upon the use to which the assets transferred were applied, or upon the economic and business consequences for the transferee corporation. Instead, the Court stressed the intent or motive of the transferor and determined the tax character of the transaction by that intent or motive. Thus, the decisional distinction between *Detroit Edison* and *Brown Shoe* rested upon the nature of the benefit to the transferor, rather than to the transferee, and upon whether that benefit was direct or indirect, specific or general, certain or speculative.[12] These factors, of course, are simply indicia of the transferor's intent or motive.

[12] See, for example, *Teleservice Co.* v. *Commissioner*, 254 F. 2d 105 (CA3 1958), cert. denied, 357 U. S. 919 (1959); *United Grocers, Ltd.* v. *United States*, 308 F. 2d 634 (CA9 1962). There is support in the legislative history of § 118 of the 1954 Code, 26 U. S. C. § 118, providing for the exclusion from gross income of "any contribution to the capital of the taxpayer," for the indirect benefit—prepayment-

That this line of inquiry, and these distinctions, have relatively little to do with the economic and business consequences of the transaction seems self-evident.[13] In both cases the assets transferred were actually used in the transferee's trade or business for the production of income. In neither case did the transferee provide the investment for the assets sought to be depreciated. Yet in both cases, the assets in question were transferred for a consideration pursuant to an agreement. If, at first glance, *Detroit Edison* and *Brown Shoe* seem somewhat inconsistent, they may be reconciled, and indeed must be, on the ground that in *Detroit Edison* the transferor intended no contribution to the transferee's capital, whereas in *Brown Shoe* the transferors did have that intent.

The statutory phrase "contribution to capital" is nowhere expressly defined in either the 1939 Code or the 1954 Code, and our prior decisions provide only limited guidance as to its precise meaning. *Detroit Edison* might be said to be only a holding that a payment for services is not a contribution to capital. *Brown Shoe* sheds little additional light, for the Court stated only that because the community payments were not compensation for specific services rendered, and did not con-

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for-future-services distinction. H. R. Rep. No. 1337, 83d Cong., 2d Sess., 17 (1954).

[13] The distinctions wrought by *Detroit Edison* and *Brown Shoe* have been the subject of scholarly criticism. See, for example, Note, Taxation of Nonshareholder Contributions to Corporate Capital, 82 Harv. L. Rev. 619 (1969); Landis, Contributions to Capital of Corporations, 24 Tax L. Rev. 241 (1969); Note, Tax Consequences of Non-Shareholder Contributions to Corporate Capital, 66 Yale L. J. 1085 (1957); Freeman & Speiller, Tax Consequences of Subsidies to Induce Business Location, 9 Tax. L. Rev. 255 (1954). In the article last cited the authors suggest that *Detroit Edison* and *Brown Shoe* are irreconcilable, the latter in effect overruling the former. *Id.*, at 262. See also The Supreme Court, 1949 Term, 64 Harv. L. Rev. 114, 149–151 (1950).

stitute gifts, they must have been made in order to enlarge the working capital of the company. 339 U. S., at 591.

But other characteristics of a contribution to capital are implicit in the two cases and become apparent when viewed in the light of the facts presently before us. In *Brown Shoe,* for example, the contributed funds were intended to benefit not only the transferors but the transferee as well, for the assets were put to immediate use by the taxpayer for the generation of additional income. Without benefit to the taxpayer, the agreement certainly would not have been made. Perhaps to some extent this was true in *Detroit Edison;* that taxpayer, however, was a public utility, and the anticipated revenue from the service lines to the customers would not have warranted the investment by the utility itself. 319 U. S., at 99. Its benefit, therefore, was marginal.

We can distill from these two cases some of the characteristics of a nonshareholder contribution to capital under the Internal Revenue Codes. It certainly must become a permanent part of the transferee's working capital structure. It may not be compensation, such as a direct payment for a specific, quantifiable service provided for the transferor by the transferee. It must be bargained for. The asset transferred foreseeably must result in benefit to the transferee in an amount commensurate with its value. And the asset ordinarily, if not always, will be employed in or contribute to the production of additional income and its value assured in that respect.

By this measure, the assets with which this case is concerned clearly do not qualify as contributions to capital. Although the assets were not payments for specific, quantifiable services performed by CB&Q for the Government as a customer, other characteristics of

the transaction lead us to the conclusion that, despite this, the assets did not qualify as contributions to capital. The facilities were not in any real sense bargained for by CB&Q. Indeed, except for the orders by state commissions and the governmental subsidies, the facilities most likely would not have been constructed at all.[14] See *Nashville, C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405, 421–424 (1935). The transaction in substance was unilateral: CB&Q would accept the facilities if the Government would require their construction and would pay for them. Any incremental economic benefit to CB&Q from the facilities was marginal; its extent and importance were indicated and accounted for by the requirement that the railroad pay not to exceed 10% of the cost in relation to its own benefit.[15] The facilities were peripheral to its business and did not materially contribute to the production of further income by the railroad. They simply replaced existing facilities or provided new, better, and safer ones where none otherwise would have been deemed necessary. As the Court of Claims found, the facilities were constructed "primarily for the benefit of the public to improve safety and to expedite highway traffic flow," [16] and the need of the railroad for capital funds was not considered, 197 Ct. Cl., at 326. While some incremental benefit from lower accident rates, from reduced expenses of operating crossing facilities, and from possibly higher train speed might have resulted, these were incidental and insubstantial in relation to the value now sought to be depreciated, and they

[14] Counsel for CB&Q stated at oral argument that the railroad was under a "preexisting legal obligation to construct these facilities" that were funded by the governmental subsidies. Tr. of Oral Arg. 30, 35–36.

[15] The Government does not challenge the CB&Q's right to depreciate those portions of a facility for which it was required to pay.

[16] See n. 5, *supra*.

were presumably considered in computing the railroad's maximum 10% liability under the Act. In our view, no substantial incremental benefit in terms of the production of income was foreseeable or taken into consideration at the time the facilities were transferred. Accordingly, no contribution to capital was effected.

CB&Q nevertheless contends that it is entitled to depreciate the facilities because of its obligation to maintain and replace them. Whatever may be the desirability of creating a depreciation reserve under these circumstances, as a matter of good business and accounting practice, the answer is, as Judge Davis of the Court of Claims observed in dissent, 197 Ct. Cl., at 318, 455 F. 2d, at 1025, "Depreciation reflects the cost of an existing capital asset, not the cost of a potential replacement." *Reisinger* v. *Commissioner,* 144 F. 2d 475, 478 (CA2 1944). See *United States* v. *Ludey,* 274 U. S. 295, 300–301 (1927); *Weiss* v. *Wiener,* 279 U. S. 333, 335–336 (1929); *Helvering* v. *Lazarus & Co.,* 308 U. S. 252, 254 (1939); *Massey Motors* v. *United States,* 364 U. S. 92 (1960); *Fribourg Nav. Co.* v. *Commissioner,* 383 U. S. 272 (1966).

We conclude that the governmental subsidies did not constitute contributions to CB&Q's capital, within the meaning of § 113 (a)(8) of the 1939 Code; that the assets in question in the hands of CB&Q have a zero basis, under §§ 113 and 114 of that Code and § 1052 (c) of the 1954 Code, 26 U. S. C. § 1052 (c); and that CB&Q is therefore precluded from claiming a depreciation allowance with respect to those assets.[17] The judgment of the

[17] The Government has argued, in the alternative, that, by virtue of a "terms letter" agreement entered into by CB&Q and the Commissioner with respect to a change in the railroad's accounting method from retirement to straight-line depreciation, CB&Q irrevocably agreed to exclude donated property, or contributions or grants in aid of construction from any source, from its depreciation base. Be-

Court of Claims on this issue is reversed and the case is remanded for further proceedings.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

While I join the dissent of MR. JUSTICE STEWART, I add a few words. Funds were contributed by the States and by the Federal Government to respondent for the construction of highway overpasses and underpasses and for grade-crossing protection equipment. While the Government provided most of the funds, the respondent did most of the construction work—all as found by the Court of Claims. 197 Ct. Cl. 264, 271, 455 F. 2d 993, 997–998.

This case is not controlled by *Detroit Edison Co.* v. *Commissioner,* 319 U. S. 98, as MR. JUSTICE STEWART says, for there the advances were made by customers of a utility as part of "the price of the service." *Id.,* at 103. Here, however, the situation was different. As the Court of Claims found:

> "[U]nder all the agreements, plaintiff was obligated to maintain and replace as necessary, at its own expense, facilities originally built. The facilities were constructed primarily for the benefit of the public to improve safety and to expedite motor-vehicle traffic flow. The record shows, however, that plaintiff received economic benefits from the facilities, *e. g.,* probable lower accident rates, reduced expenses of operating crossing equipment and, where

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cause of our conclusion that the governmental payments did not qualify as contributions to capital, we need not determine whether the "terms letter" agreement barred CB&Q from claiming depreciation on the assets in question.

permitted, higher train speed limits. Plaintiff also received intangible benefits, *e. g.*, goodwill from the community-at-large, which was to plaintiff's long-term economic advantage." 197 Ct. Cl., at 272, 455 F. 2d, at 998.

The case is therefore on all fours with *Brown Shoe Co.* v. *Commissioner*, 339 U. S. 583. In distinguishing *Detroit Edison* we said:

"Since in this case there are neither customers nor payments for service, we may infer a different purpose in the transactions between petitioner and the community groups. The contributions to petitioner were provided by citizens of the respective communities who neither sought nor could have anticipated any direct service or recompense whatever, their only expectation being that such contributions might prove advantageous to the community at large. Under these circumstances the transfers manifested a definite purpose to enlarge the working capital of the company." *Id.*, at 591.

I would affirm the judgment of the Court of Claims.

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS joins, dissenting.

This case involves the depreciation of certain railroad facilities constructed with public funds prior to June 22, 1954. The precise question before the Court is whether those facilities constituted "contributions to capital" within the meaning of § 113 (a)(8)(B) of the Internal Revenue Code of 1939.

Beginning in the early 1930's, various state governments entered into agreements with the respondent railroad for the construction of highway overpasses and underpasses at highway-railroad intersections, and construction of grade-crossing protection equipment such as

flashing-light signals and automatic gates. The agreements generally provided that the States would pay 50% or more of the total cost, and subsequently Congress authorized the Federal Government to assume the State's share of the construction costs. See National Industrial Recovery Act § 204 (a), 48 Stat. 203. Under the Federal-Aid Highway Act of 1944, § 5, 58 Stat. 840, the Federal Government reimbursed the States for the entire cost of the highway-railroad crossing projects, subject to payment by the railroads for up to 10% of the cost of the project if the railroads were benefited by the facilities.

The respondent filed suit in the Court of Claims seeking a refund on its 1955 income taxes, claiming that the Commissioner of Internal Revenue had erred by refusing to allow a depreciation deduction for these publicly contributed facilities. The respondent asserted that these facilities were "depreciable property" held throughout 1955 "for use in its trade or business," and that they were acquired prior to June 22, 1954, as "contributions to capital."

The respondent's claim was an uncomplicated one. Section 167 of the Internal Revenue Code of 1954, 26 U. S. C. § 167, applicable to the respondent's 1955 income tax return, allowed as a depreciation deduction "a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—(1) of property used in the trade or business . . . ." Section 1052 (c) of the 1954 Code, 26 U. S. C. § 1052 (c), provided for using the basis rules of the 1939 Code for certain property that was acquired in transactions to which the 1939 Code applied, including "contributions to capital." [1] The

[1] The basis provision of the 1954 Code, which provides a zero basis for nonshareholder contributions to capital, applies only to property acquired on or after June 22, 1954. 26 U. S. C. § 362. See n. 9,

respondent contended that the publicly contributed facilities were "contributions to capital," and that under § 113 (a)(8)(B) of the 1939 Code, it could carry over the transferor's basis; in short, it claimed that its basis for the highway-safety facilities was the cost of the facilities to the governments that had financed them.[2]

The Court of Claims agreed with the respondent that these facilities were exhaustible assets properly depreciable to the full extent of their value. 197 Ct. Cl. 264, 276, 455 F. 2d 993, 1002. The depreciable nature of the facilities was undisputed, since the Government conceded that "the facilities are of a character normally subject to allowance for depreciation and that to the extent they were paid for by [the respondent], appropriate depreciation deductions are proper." *Id.*, at 273–274, 455 F. 2d, at 999. The court concluded that the facilities were "contributions to capital" under § 113 (a)(8)(B) of the 1939 Code and that the Government's cost basis in the facilities was, therefore, available to the respondent.[3] "The facilities were constructed primarily for the benefit of the public to improve safety and to expedite motor-vehicle traffic flow. The record shows, however, that

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infra. All the property at issue in the present case was acquired before June 22, 1954.

[2] Section 113 (a)(8) provides in pertinent part:

"If the property was acquired after December 31, 1920, by a corporation—

. . . . .

"(B) as paid-in surplus or as a contribution to capital, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made."

[3] It was undisputed that the facilities had been "contributed" to the respondent by the States, "and this is taken to mean that [the respondent] owns them . . . ." 197 Ct. Cl. 264, 272, 455 F. 2d 993, 998.

[the respondent] received economic benefits from the facilities, *e. g.*, probable lower accident rates, reduced expenses of operating crossing equipment and, where permitted, higher train speed limits. [The respondent] also received intangible benefits, *e. g.*, goodwill from the community-at-large, which was to [the respondent's] long-term economic advantage." *Id.*, at 272, 455 F. 2d, at 998.[4] The court thus concluded "that the facilities enlarged [the respondent's] working capital and were used by [the respondent] in its business; and though they may not produce income to the same extent as other railroad property, such as track or freight cars, [the respondent] derived economic benefits from them." *Id.*, at 276, 455 F. 2d, at 1000.

I think the Court of Claims was entirely right in holding that these publicly contributed facilities constituted contributions to capital within the meaning of § 113 (a)(8)(B) of the 1939 Code.[5] The facilities at issue fall within the plain language of a "contribution to capital." As the Court noted, they were "contributed" to the respondent in the sense that the railroad now owns them.

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[4] The Findings of Fact of the Trial Commissioner which were accepted by the court indicated as follows:

"The facilities . . . were constructed primarily for the benefit of the public to improve safety and to expedite highway traffic flow. [The respondent], however, received benefits from the facilities, among others, probable lower accident rates, reduced expenses of operating crossing facilities, and, where permitted, higher train speed limits, all of which permitted [the respondent] to function more efficiently and presumably less expensively." 197 Ct. Cl., at 326–327.

[5] The Government has suggested as an alternative basis for reversal that the respondent entered into a "terms letter" agreement with the Commissioner whereby it agreed to exclude contributed property from its depreciation base. The Court does not reach this contention. I agree with the reasoning of the Court of Claims in holding that the terms letter did not bar the respondent from claiming a depreciation deduction on contributed property.

And they are now part of the "capital" of the railroad as that term is generally used in business and accounting practice, part of the permanent investment in the business. See *Brown Shoe Co.* v. *Commissioner,* 339 U. S. 583, 589 and n. 11; *Texas & Pacific R. Co.* v. *United States,* 286 U. S. 285; *Edwards* v. *Cuba R. Co.,* 268 U. S. 628, 631–633; H. Guthmann & H. Dougall, Corporate Financial Policy 136–138 (4th ed.); R. Marple, Capital Surplus and Corporate Net Worth 136–137; 1 J. Mertens, Law of Federal Income Taxation § 5.06 n. 47 (J. Malone rev. ed.); Harvey, Some Indicia of Capital Transfers Under the Federal Income Tax Laws, 37 Mich. L. Rev. 745, 747–749.[6]

The only two prior decisions of this Court that bear directly on the question before us—*Detroit Edison Co.* v. *Commissioner,* 319 U. S. 98, and *Brown Shoe Co.* v. *Commissioner, supra*—confirm that these publicly contributed facilities are contributions to the respondent's capital.

In *Detroit Edison Co.* v. *Commissioner, supra,* prospective customers of an electric company were required to pay for the construction of additional facilities in order

[6] The text of § 113 indicates that there is no significance in the fact that the State and Federal Governments attempted here to achieve the public goal of transportation safety rather than simply to make a gratuitous transfer to the railroad. For if a donative purpose were required for a "contribution to capital" then that provision would simply be duplicative of § 113 (a)(2) of the 1939 Code which allows a carryover basis for gifts.

And similarly it is of no consequence that the contribution was by a nonshareholder, for a contribution by a shareholder would have a carryover basis under the "paid-in surplus" provision of § 113 (a)(8)(B). See Treas. Reg. 111, § 29.113 (a)(8)–1.

In short, a "contribution to capital" is any nongratuitous transfer to a corporation by a nonshareholder, such as is involved in the present case. See Freeman & Speiller, Tax Consequences of Subsidies to Induce Business Location, 9 Tax L. Rev. 255, 261.

to receive the company's services. The Court rejected the contention that those payments were contributions to capital: "[I]t overtaxes imagination to regard the farmers and other customers who furnished these funds as makers either of donations or contributions to the Company. . . . The payments were to the customer the price of the service." *Id.*, at 102–103.

In *Brown Shoe, supra,* various community groups contributed cash and property to the taxpayer corporation to induce it to locate in or expand its operations in the respective communities. The Court held these assets to be "contributions to capital" within the meaning of § 113 (a)(8)(B), stressing the fact that they were in a very practical sense an addition to the corporation's capital: "'[T]he assets received . . . are being used by the taxpayer in the operation of its business. They will in time wear out, and if [the taxpayer] is to continue in business, the physical plant must eventually be replaced. Looking as they do toward business continuity, the Internal Revenue Code's depreciation provisions—and especially those which provide for a substituted rather than a cost basis—would seem to envision allowance of a depreciation deduction in situations like this. . . .'" *Id.*, at 590 (quoting *Commissioner* v. *McKay Products Corp.*, 178 F. 2d 639, 643). The Court explained *Detroit Edison* as a case of payments for services rather than contributions to capital. By contrast, in *Brown Shoe,* "[t]he contributions to [the taxpayer] were provided by citizens of the respective communities who neither sought nor could have anticipated any direct service or recompense whatever, their only expectation being that such contributions might prove advantageous to the community at large." *Id.*, at 591.[7]

[7] Federal courts in distinguishing between *Brown Shoe* and *Detroit Edison* have relied on the fact that *Detroit Edison* involved direct payments by customers for services. See *United Grocers, Ltd.* v.

It seems plain to me that the present case is controlled by *Brown Shoe*. As in that case, these publicly contributed facilities were in no sense direct payments for services. The State and Federal Governments did not purchase any services in connection with construction of the facilities. Rather, to achieve the public goal of transportation safety they transferred assets to the railroad which increased its working capital. In short, these assets fell within the practical, working definition of "contributions to capital" that was recognized by the Court in *Brown Shoe*, and they did not fall within the narrow exception of payments for services that the Court found significant in *Detroit Edison*.

The Government urges us to read *Brown Shoe* as holding that, in order to establish a "contribution to capital," a taxpayer must prove that the transferor of the asset had a definite purpose to enlarge the taxpayer's working capital. But that case did not turn on the presence of any such specific purpose. The purpose of the community contributions in *Brown Shoe* was to induce the taxpayer to locate or expand its operations in the local area, and this purpose was accomplished by contributing assets; there was no gratuitous attempt to enlarge the taxpayer's capital. The Court noted, in passing, the existence of a purpose to enlarge the taxpayer's working capital only in order to underline the fact that the community groups there were not customers paying compensation for services rendered. And, as in *Brown Shoe*, the State and Federal Governments here attempted to accomplish a general public goal by contributing facilities to the taxpayer. As in *Brown Shoe*, they were not paying for services.

United States, 308 F. 2d 634, 639–640; *Teleservice Co.* v. *Commissioner*, 254 F. 2d 105, 110–111. See also Note, Taxation of Nonshareholder Contributions to Corporate Capital, 82 Harv. L. Rev. 619, 626–627.

The Court today, however, does not appear to decide this case on the presence or absence of any specific motive, intent, or purpose. Rather, the Court constructs a series of guidelines that must be met before there can be a "contribution to capital." These guidelines seem to be based upon the value of the assets to the transferee. For the Court relies primarily on the fact that the publicly financed facilities were "peripheral" to the railroad's business and did not materially contribute to the production of further income, and concludes that they were not therefore contributions to the railroad's capital. But the Court cites nothing in the statute, the regulations, or our prior cases to warrant this strange definition of "capital" when that term is used in the phrase "contribution to capital."

Brown Shoe made clear that "capital" was to be defined "as that term has commonly been understood in both business and accounting practice . . . ." 339 U. S., at 589. The facilities in the present case meet that test. They are certainly part of the respondent's capital under any traditional understanding of that term; they are assets permanently invested in the railroad's business. See *supra*, at 421. Indeed, many of these facilities are essential to the railroad's continued operation—a railroad bridge, for example, is an obvious physical necessity if the railroad is to operate. All of the facilities enlarged the railroad's working capital, were used in its business, and yielded tangible and intangible economic benefits to the railroad. And the Court even appears to acknowledge that these assets are "capital" in the normal sense of that term, since it concedes that the portion of the facilities constructed by the railroad with its own funds is depreciable.[8] I do not understand why

[8] There is no dispute that the railroad can claim a depreciation deduction for its 10% share of the cost of the facilities.

that portion of the *same assets* that was contributed to the railroad is not also part of the railroad's capital. I would maintain the straightforward approach taken by *Brown Shoe* and *Detroit Edison*—nonshareholder additions to capital are "contributions to capital" unless they are direct payments for services rendered.

The Government argues that to allow the railroad to claim a depreciation deduction on these facilities as "contributions to capital" would lead to the "anomalous" result that although the railroad had incurred no expense with respect to the publicly financed facilities, it could nevertheless recoup their cost. But if this is an anomaly, it is the same anomaly that existed in *Brown Shoe*. The taxpayer there had not paid for the property contributed by the community groups, yet it was able to claim a full depreciation deduction on it. In short, this so-called anomaly is the ineluctable result of § 113 (a)(8)(B) which allowed a carryover basis for nonshareholder contributions to capital. It was Congress that had created the anomaly, and it was for Congress to correct it. In enacting § 362 (c) of the 1954 Code,[9]

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[9] Section 362 of the Internal Revenue Code of 1954, 26 U. S. C. § 362, provides in pertinent part:

"(a) Property acquired by issuance of stock or as paid-in surplus.

"If property was acquired on or after June 22, 1954, by a corporation—

. . . . . .

"(2) as paid-in surplus or as a contribution to capital, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain recognized to the transferor on such transfer.

. . . . . .

"(c) Special rule for certain contributions to capital.

"(1) Property other than money.

"Notwithstanding subsection (a)(2), if property other than money—

[*Footnote 9 continued on p. 426*]

Congress did precisely that. It eliminated any depreciation deduction for nonshareholder contributions to capital by providing a zero basis for such transfers, but it did so only for property acquired on or after June 22, 1954.

In sum, Congress in 1954 rewrote the tax law so as to overrule *Brown Shoe* and prohibit depreciation to be taken on contributions to capital made by nonshareholders on or after June 22, 1954.[10] As it now turns out, Congress could have saved itself the trouble. For today the Court rewrites the law and prohibits depreciation to be taken on such assets the railroad has owned since the 1930's. I would follow the law as Congress wrote it and affirm the judgment of the Court of Claims.

"(A) is acquired by a corporation, on or after June 22, 1954, as a contribution to capital, and

"(B) is not contributed by a shareholder as such,

"then the basis of such property shall be zero.

"(2) Money.

"Notwithstanding subsection (a)(2), if money—

"(A) is received by a corporation, on or after June 22, 1954, as a contribution to capital, and

"(B) is not contributed by a shareholder as such,

"then the basis of any property acquired with such money during the 12-month period beginning on the day the contribution is received shall be reduced by the amount of such contribution. The excess (if any) of the amount of such contribution over the amount of the reduction under the preceding sentence shall be applied to the reduction (as of the last day of the period specified in the preceding sentence) of the basis of any other property held by the taxpayer. The particular properties to which the reductions required by this paragraph shall be allocated shall be determined under regulations prescribed by the Secretary or his delegate."

[10] It was explicitly recognized that 26 U. S. C. § 362 (c) was enacted to overcome the effect of *Brown Shoe*. H. R. Rep. No. 1337, 83d Cong., 2d Sess., A128; S. Rep. No. 1622, 83d Cong., 2d Sess., 271–272; *Veterans Foundation* v. *Commissioner*, 317 F. 2d 456, 458.

NORTHCROSS ET AL. *v.* BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72–1164. Decided June 4, 1973

Since the Court of Appeals' denial of costs and attorneys' fees under § 718 of the Emergency School Aid Act of 1972 to petitioners, who were successful in litigation aimed at desegregating the public schools of Memphis, Tenn., was without stated reasons, this Court cannot determine whether the proper standard, *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, was correctly applied. Certiorari granted; vacated and remanded.

PER CURIAM.

This case presents the question of the propriety, under § 718 of the Emergency School Aid Act of 1972, 86 Stat. 369, 20 U. S. C. § 1617, of a denial of attorneys' fees to the successful plaintiffs in this litigation aimed at desegregating the public schools of Memphis, Tennessee. Section 718, which became effective on July 1, 1972, provides that "[u]pon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof)," in any action seeking to redress illegal or unconstitutional discrimination with respect to "elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." In this case, the United States Court of Appeals for the Sixth Circuit denied petitioners' motion for an award of attorneys' fees. The Court of Appeals did not, however, state reasons for the denial and it is therefore not possible for this

Court to determine whether the Court of Appeals applied the proper standard in reaching this result.[1]

Section 718 tracks the wording of § 204 (b) of the Civil Rights Act of 1964, 78 Stat. 244, 42 U. S. C. § 2000a–3(b), which provides that, in an action seeking to enforce Title II of that Act, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . ." In *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400 (1968), we held that, under § 204 (b), "one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.*, at 402. The similarity of language in § 718 and § 204 (b) is, of course, a strong indication that the two statutes should be interpreted *pari passu*. Moreover, "the two provisions share a common *raison d'être*. The plaintiffs in school cases are 'private attorneys general' vindicating national policy in the same sense as are plaintiffs in Title II actions. The enactment of both provisions was for the same purpose—'to encourage individuals injured by racial discrimination to seek judicial relief . . . .'" *Johnson* v. *Combs*, 471 F. 2d 84, 86 (CA5 1972), quoting *Newman* v. *Piggie Park Enterprises, Inc., supra*, at 402. We therefore conclude that, as with § 204 (b), if other requirements of § 718 are satisfied, the successful plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." 390 U. S., at 402. Since it is impossible for us

[1] Respondents suggest that petitioners' motion for costs and attorneys' fees might have been denied due to untimeliness. Although it is clear that the petitions for rehearing en banc were denied as untimely, there is no indication that the bill of costs was filed out of time, or that costs and attorneys' fees were denied for that reason.

to determine whether the Court of Appeals applied this standard and, if so, whether it did so correctly, we grant the petition for certiorari, vacate the judgment below insofar as it relates to the denial of attorneys' fees, and remand to the Court of Appeals for further proceedings consistent with this opinion.[2] See *Taylor* v. *McKeithen*, 407 U. S. 191 (1972); cf. *California* v. *Krivda*, 409 U. S. 33 (1972).

MR. JUSTICE MARSHALL did not participate in the consideration or decision of this case.

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[2] We need not, and therefore do not, decide whether § 718 authorizes an award of attorneys' fees insofar as those expenses were incurred prior to the date that that section came into effect. We also do not decide whether, and under what circumstances, an award of attorneys' fees is permissible in suits brought under 42 U. S. C. § 1983 in the absence of specific statutory authorization for such an award. See *Knight* v. *Auciello*, 453 F. 2d 852 (CA1 1972); *Lee* v. *Southern Home Sites Corp.*, 444 F. 2d 143 (CA5 1971).

DOUGLAS *v.* BUDER, JUDGE

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

No. 72–6198. Decided June 4, 1973

Petitioner, who had been given a suspended sentence for manslaughter and placed on probation for four years, with a condition that "all arrests for any reason must be reported without delay," was thereafter involved in an automobile accident in Arkansas, for which he received a traffic citation. Eleven days later, he mentioned the citation to his probation officer, who notified respondent judge. At a hearing, the prosecutor and the probation officer recommended continued probation but respondent, stating that the failure to report the accident and the citation was not in "strict compliance with the terms of the probation," revoked probation and sentenced petitioner to jail on the original counts. The Missouri Supreme Court denied a writ of prohibition. *Held:* The issuance of the traffic citation was not an "arrest" under either Missouri or Arkansas law, and the finding that petitioner had violated his probation conditions was so totally devoid of evidentiary support as to violate due process. Even were it clear that respondent held Missouri law to be that a traffic citation is the equivalent of an arrest, such an unforeseeable holding, retroactively applied, would also deprive petitioner of due process. Certiorari granted; 485 S. W. 2d 609, reversed and remanded.

PER CURIAM.

In November 1971, petitioner, a 50-year-old truck driver with no prior offenses, pleaded guilty to two counts of manslaughter and was given a suspended sentence and placed on probation for a period of four years by the respondent Missouri Circuit Court Judge. One of the conditions of probation was that "[a]ll arrests for any reason must be reported without delay to [petitioner's] probation and parole officer." In January 1972, petitioner was involved in a seven-vehicle chain-reaction accident on an Arkansas highway. The driver of the

first vehicle was issued a traffic citation for failure to yield the right of way, and petitioner, along with four other drivers involved in the accident, was issued a citation for driving too fast for existing conditions. At the next scheduled meeting with his probation officer, 11 days after the accident, petitioner mentioned the accident and the receipt of the traffic citation. On the same day, the probation officer reported this information to respondent who thereupon scheduled a hearing for the purpose of determining whether petitioner's probation should be revoked. At the hearing, both the probation officer and the prosecutor took the position that petitioner had not violated any of the conditions of his probation and both recommended that probation be continued. Nevertheless, respondent, stating that petitioner's failure to report the accident and the traffic citation "displayed poor attitude toward his probation" and was not in "strict compliance with the terms of the probation," revoked probation and sentenced petitioner to concurrent terms of two years on each of the original two counts. Petitioner sought a writ of prohibition in the Missouri Supreme Court, but that court, in a 4–3 decision, concluded that respondent had not abused his discretion and therefore denied relief.

The apparent premise upon which respondent proceeded in revoking petitioner's probation was that petitioner had failed promptly to report an "arrest." But the issuance of the traffic citation was not an "arrest" under either Missouri or Arkansas law. By statute, Missouri defines an "arrest" as "an actual restraint of the person of the defendant, or . . . submission to the custody of the officer, under authority of a warrant or otherwise." Mo. Rev. Stat. § 544.180 (1953). Similarly, Arkansas defines an "arrest" as the "placing of the person of the defendant in restraint, or . . . submitting to the custody of the person making the arrest."

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Ark. Stat. Ann. § 43–412 (1947). The record before us discloses absolutely no evidence that petitioner was subjected to an "actual restraint" or taken into "custody" at the scene of the accident or elsewhere. Consequently, we conclude that the finding that petitioner had violated the conditions of his probation by failing to report "all arrests . . . without delay" was so totally devoid of evidentiary support as to be invalid under the Due Process Clause of the Fourteenth Amendment. *Thompson* v. *Louisville,* 362 U. S. 199 (1960); *Garner* v. *Louisiana,* 368 U. S. 157 (1961).

The State argues, however, that the revocation of petitioner's probation should be viewed as a determination by respondent that, for purposes of Missouri law, a traffic citation is the equivalent of an arrest even though not accompanied by an actual restraint. But neither respondent nor the Missouri Supreme Court specifically made such a finding and no prior Missouri decisional law is cited to support the contention that a traffic citation has ever before been treated as the equivalent of an arrest. Moreover, even if it were clear that respondent had declared Missouri law to be that a traffic citation is the equivalent of an arrest, we would have to conclude that under the rationale of *Bouie* v. *City of Columbia,* 378 U. S. 347 (1964), the unforeseeable application of that interpretation in the case before us deprived petitioner of due process. We held in *Bouie* that "[w]hen . . . [an] unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." *Id.,* at 354–355. And that same principle of due process is fully applicable in the context of the case before us.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is reversed and the cause is remanded to the Missouri Supreme Court for proceedings not inconsistent with this opinion.

Reversed and remanded.

THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST concur in the result.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

STRUNK, AKA WAGNER *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 72–5521. Argued April 24, 1973—Decided June 11, 1973

Petitioner was convicted of a federal offense and was sentenced to a term of five years, to run concurrently with a sentence of one to three years that he was serving pursuant to a state-court conviction. Before trial, the District Court denied his motion to dismiss the federal charge on the ground that he had been denied a speedy trial. The Court of Appeals reversed, holding that he had been denied a speedy trial, but that the "extreme" remedy of dismissal of the charges was not warranted. The case was remanded to the District Court to reduce the sentence by 259 days, to compensate for the unnecessary delay that had occurred between the return of the indictment and petitioner's arraignment. The Government did not file a cross-petition for certiorari challenging the finding of denial of a speedy trial. *Held:* In this case, the only question for review is the propriety of the remedy fashioned by the Court of Appeals. In light of the policies underlying the right to a speedy trial, dismissal must remain, as noted in *Barker* v. *Wingo*, 407 U. S. 514, 522, "the only possible remedy" for deprivation of this constitutional right. Pp. 435–440.

467 F. 2d 969, reversed and remanded.

BURGER, C. J., wrote the opinion for a unanimous Court.

John R. Wideikis argued the cause and filed a brief for petitioner *pro hac vice.*

William Bradford Reynolds argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Petersen,* and *Jerome M. Feit.*

Opinion of the Court by MR. CHIEF JUSTICE BURGER, announced by MR. JUSTICE DOUGLAS.

Petitioner was found guilty in United States District Court of transporting a stolen automobile from

Wisconsin to Illinois in violation of 18 U. S. C. § 2312 and was sentenced to a term of five years. The five-year sentence was to run concurrently with a sentence of one to three years that petitioner was then serving in the Nebraska State Penitentiary pursuant to a conviction in the courts of that State.

Prior to trial, the District Court denied a motion to dismiss the federal charge, in which petitioner argued that he had been denied his right to a speedy trial. At trial, petitioner called no witnesses and did not take the stand; the jury returned a verdict of guilty. The Court of Appeals reversed the District Court, holding that petitioner had in fact been denied a speedy trial. However, the court went on to hold that the "extreme" remedy of dismissal of the charges was not warranted; the case was remanded to the District Court to reduce petitioner's sentence to the extent of 259 days in order to compensate for the unnecessary delay which had occurred between return of the indictment and petitioner's arraignment.

I

Certiorari was granted on petitioner's claim that, once a judicial determination has been made that an accused has been denied a speedy trial, the only remedy available to the court is "to reverse the conviction, vacate the sentence, and dismiss the indictment." No cross-petition was filed by the Government to review the determination of the Court of Appeals that the defendant had been denied a speedy trial. The Government acknowledges that, in its present posture, the case presents a novel and unresolved issue, not controlled by any prior decisions of this Court.

The Court of Appeals stated that the 10-month delay which occurred was "unusual and call[ed] for explanation as well as justification," 467 F. 2d 969, 972. The Gov-

ernment responded that petitioner had, after receiving the proper warnings, freely admitted his guilt to an FBI agent while incarcerated in the Nebraska Penitentiary, and had stated that he intended to demand a speedy trial under Fed. Rule Crim. Proc. 20. The Government claimed that it had postponed prosecution because of petitioner's reference to Rule 20, and consequently, that a large portion of the delay which ensued was attributable to petitioner. The Court of Appeals regarded this explanation as tenuous; it also rejected the lack of staff personnel in the United States Attorney's Office as a justification for the delay. The entire course of events from the time of arrest through the Court of Appeals plainly placed the Government on notice that the speedy trial issue was being preserved by the accused and would be pressed, as indeed it has been.

On this record, it seems clear that petitioner was responsible for a large part of the 10-month delay which occurred and that he neither showed nor claimed that the preparation of his defense was prejudiced by reason of the delay. It may also well be correct that the United States Attorney was understaffed due to insufficient appropriations and, consequently, was unable to provide an organization capable of dealing with the rising caseload in his office, especially with respect to criminal cases. Unintentional delays caused by overcrowded court dockets or understaffed prosecutors are among the factors to be weighed less heavily than intentional delay, calculated to hamper the defense, in determining whether the Sixth Amendment has been violated but, as we noted in *Barker* v. *Wingo*, 407 U. S. 514, 531 (1972), they must

> "nevertheless . . . be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant."

This served to reaffirm what the Court held earlier in *Dickey* v. *Florida*, 398 U. S. 30, 37–38 (1970):

> "Although a great many accused persons seek to put off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial." [1] (Footnote omitted.)

However, in the absence of a cross-petition for certiorari, questioning the holding that petitioner was denied a speedy trial, the only question properly before us for review is the propriety of the remedy fashioned by the Court of Appeals. Whether in some circumstances, and as to some questions, the Court might deal with an issue involving constitutional claims, absent its being raised by cross-petition, we need not resolve. Suffice it that in the circumstances presented here in which the speedy trial issue has been pressed by the accused from the time of arrest forward and resolved in his favor, we are not disposed to examine the issue since we must assume the Government deliberately elected to allow the case to be resolved on the issue raised by the petition for certiorari.

II

Turning to the remaining question of the power of the Court of Appeals to fashion what it appeared to consider as a "practical" remedy, we note that the court clearly perceived that the accused had an interest in being tried promptly, even though he was confined in a penitentiary for an unrelated charge. Under these circumstances,

> "the possibility that the defendant already in prison might receive a sentence at least partially

[1] American Bar Association Project on Standards for Criminal Justice, Speedy Trial 27–28 (Approved Draft 1968) (hereafter ABA, Speedy Trial).

concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed." *Smith* v. *Hooey*, 393 U. S. 374, 378 (1969) (footnote omitted).

The Court of Appeals went on to state:

"The remedy for a violation of this constitutional right has traditionally been the dismissal of the indictment or the vacation of the sentence. Perhaps the severity of that remedy has caused courts to be extremely hesitant in finding a failure to afford a speedy trial. Be that as it may, we know of no reason why less drastic relief may not be granted in appropriate cases. Here no question is raised about the sufficiency of evidence showing defendant's guilt, and, as we have said, he makes no claim of having been prejudiced in presenting his defense. In these circumstances, the vacation of the sentence and a dismissal of the indictment would seem inappropriate. Rather, we think the proper remedy is to remand the case to the district court with direction to enter an order instructing the Attorney General to credit the defendant with the period of time elapsing between the return of the indictment and the date of the arraignment. Fed. R. Crim. P. 35 provides that the district court may correct an illegal sentence at any time. We choose to treat the sentence here imposed as illegal to the extent of the delay we have characterized as unreasonable." 467 F. 2d, at 973.

It is correct, as the Court of Appeals noted, that *Barker* prescribes "flexible" standards based on practical considerations. However, that aspect of the holding in *Barker* was directed at the process of determining *whether* a denial of speedy trial had occurred; it did not deal with the remedy for denial of this right. By defini-

tion, such denial is unlike some of the other guarantees of the Sixth Amendment. For example, failure to afford a public trial, an impartial jury, notice of charges, or compulsory service can ordinarily be cured by providing those guaranteed rights in a new trial. The speedy trial guarantee recognizes that a prolonged delay may subject the accused to an emotional stress that can be presumed to result in the ordinary person from uncertainties in the prospect of facing public trial or of receiving a sentence longer than, or consecutive to, the one he is presently serving—uncertainties that a prompt trial removes. *Smith* v. *Hooey*, 393 U. S., at 379; *United States* v. *Ewell*, 383 U. S. 116, 120 (1966). We recognize, as the Court did in *Smith* v. *Hooey*, that the stress from a delayed trial may be less on a prisoner already confined, whose family ties and employment have been interrupted,[2] but other factors such as the prospect of rehabilitation may also be affected adversely. The remedy chosen by the Court of Appeals does not deal with these difficulties.

The Government's reliance on *Barker* to support the remedy fashioned by the Court of Appeals is further undermined when we examine the Court's opinion in that case as a whole. It is true that *Barker* described dismissal of an indictment for denial of a speedy trial as an "unsatisfactorily severe remedy." Indeed, in practice, "it means that a defendant who may be guilty of a serious crime will go free, without having been tried." 407 U. S., at 522. But such severe remedies are not unique in the application of constitutional standards.

[2] It can also be said that an accused released pending trial often has little or no interest in being tried quickly; but this, standing alone, does not alter the prosecutor's obligation to see to it that the case is brought on for trial. The desires or convenience of individuals cannot be controlling. The public interest in a broad sense, as well as the constitutional guarantee, commands prompt disposition of criminal charges.

In light of the policies which underlie the right to a speedy trial, dismissal must remain, as *Barker* noted, "the only possible remedy." *Ibid.*

Given the unchallenged determination that petitioner was denied a speedy trial,[3] the District Court judgment of conviction must be set aside; the judgment is therefore reversed and the case remanded to the Court of Appeals to direct the District Court to set aside its judgment, vacate the sentence, and dismiss the indictment.

Reversed and remanded.

[3] ABA, Speedy Trial 40–41.

VLANDIS *v.* KLINE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

No. 72–493. Argued March 20, 1973—Decided June 11, 1973

Connecticut requires nonresidents enrolled in the state university system to pay tuition and other fees at higher rates than state residents and provides an irreversible and irrebuttable statutory presumption that because the legal address of a student, if married, was outside the State at the time of application for admission or, if single, was outside the State at some point during the preceding year, he remains a nonresident as long as he is a student in Connecticut. Appellees challenge that presumption, claiming that they have a constitutional right to controvert it by presenting evidence of bona fide residence in the State. The District Court upheld their claim. *Held:* The Due Process Clause of the Fourteenth Amendment does not permit Connecticut to deny an individual the opportunity to present evidence that he is a bona fide resident entitled to in-state rates, on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination. Pp. 446–454.

346 F. Supp. 526, affirmed.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and POWELL, JJ., joined. MARSHALL, J., filed a concurring opinion, in which BRENNAN, J., joined, *post*, p. 454. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 456. BURGER, C. J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 459. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and DOUGLAS, J., joined, *post*, p. 463.

John G. Hill, Jr., Assistant Attorney General of Connecticut, argued the cause for appellant. With him on the brief was *Robert K. Killian*, Attorney General.

John A. Dziamba argued the cause for appellees. With him on the brief was *Douglas M. Crockett.**

MR. JUSTICE STEWART delivered the opinion of the Court.

Like many other States, Connecticut requires nonresidents of the State who are enrolled in the state university system to pay tuition and other fees at higher rates than residents of the State who are so enrolled. Conn. Gen. Stat. Rev. § 10–329 (b) (Supp. 1969), as amended by Public Act No. 5, § 122 (June Sess. 1971).[1] The constitutional validity of that requirement is not at issue in the case before us. What is at issue here is Connecticut's statutory definition of residents and nonresidents for purposes of the above provision.

Section 126 (a)(2) of Public Act No. 5, amending § 10–329 (b), provides that an unmarried student shall be classified as a nonresident, or "out of state," student if his "legal address for any part of the one-year period immediately prior to his application for admission at a constituent unit of the state system of higher education was outside of Connecticut." With respect to married students, § 126 (a)(3) of the Act provides that such a student, if living with his spouse, shall be classified as

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**Leonard J. Schwartz* filed a brief for the American Civil Liberties Union of Ohio, Inc., as *amicus curiae* urging affirmance.

Slade Gorton, Attorney General, *James B. Wilson*, Senior Assistant Attorney General, and *Gerald L. Coe*, Assistant Attorney General, filed a brief for the State of Washington as *amicus curiae*.

[1] Section 122 of that Act provides that "the board of trustees of The University of Connecticut shall fix fees for tuition of not less than three hundred fifty dollars for residents of this State and not less than eight hundred fifty dollars for nonresidents . . . ." Pursuant to this statute, the University promulgated regulations fixing the tuition per semester as follows:

"out of state" if his "legal address at the time of his application for admission to such a unit was outside of Connecticut." These classifications are permanent and irrebuttable for the whole time that the student remains at the university, since § 126 (a)(5) of the Act commands that: "The status of a student, as established at the time of his application for admission at a constituent unit of the state system of higher education under the provisions of this section, shall be his status for the entire period of his attendance at such constituent unit." The present case concerns the constitutional validity of this conclusive and unchangeable presumption of nonresident status from the fact that, at the time of application for admission, the student, if married, was then living outside of Connecticut, or, if single, had lived outside the State at some point during the preceding year.

One appellee, Margaret Marsh Kline, is an undergraduate student at the University of Connecticut. In May 1971, while attending college in California, she became engaged to Peter Kline, a lifelong Connecticut resident. Because the Klines wished to reside in Connecticut after their marriage, Mrs. Kline applied to the University of Connecticut from California. In late May, she was accepted and informed by the University that she would be considered an in-state student. On June 26, 1971, the appellee and Peter Kline were married in California, and soon thereafter took up residence in Storrs, Connecticut, where they have established

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	Fall semester 1971–72	Spring semester 1972, and thereafter
In-state student	None	$175.00
Out-of-state student	$150.00	$425.00

In addition, out-of-state students must pay a $200 nonresident fee per semester.

a permanent home. Mrs. Kline has a Connecticut driver's license, her car is registered in Connecticut, and she is registered as a Connecticut voter. In July 1971, Public Act No. 5 went into effect. Accordingly, the appellant, Director of Admissions at the University of Connecticut, irreversibly classified Mrs. Kline as an out-of-state student, pursuant to § 126 (a)(3) of that Act. As a consequence, she was required to pay $150 tuition and a $200 nonresident fee for the first semester, whereas a student classified as a Connecticut resident paid no tuition; and upon registration for the second semester, she was required to pay $425 tuition plus another $200 nonresident fee, while a student classified as a Connecticut resident paid only $175 tuition.[2]

The other appellee, Patricia Catapano, is an unmarried graduate student at the same University. She applied for admission from Ohio in January 1971, and was accepted in February of that year. In August 1971, she moved her residence from Ohio to Connecticut and registered as a full-time student at the University. Like Mrs. Kline, she has a Connecticut driver's license, her car is registered in Connecticut, and she is registered as a Connecticut voter. Pursuant to § 126 (a)(2) of the 1971 Act, the appellant classified her permanently as an out-of-state student. Consequently, she, too, was required to pay $150 tuition and a $200 nonresident fee for her first semester, and $425 tuition plus a $200 nonresident fee for her second semester.

Appellees then brought suit in the District Court pursuant to the Civil Rights Act of 1871, 42 U. S. C. § 1983, contending that they were bona fide residents of Connecticut, and that § 126 of Public Act No. 5, under which they were classified as nonresidents for purposes of their tuition and fees, infringed their rights to due process of law

[2] See n. 1, *supra*.

and equal protection of the laws, guaranteed by the Fourteenth Amendment to the Constitution.[3] After the convening of a three-judge District Court, that court unanimously held §§ 126 (a)(2), (a)(3), and (a)(5) unconstitutional, as violative of the Fourteenth Amendment, and enjoined the appellant from enforcing those sections. 346 F. Supp. 526 (1972). The court also found that before the commencement of the spring semester in 1972, each appellee was a bona fide resident of Connecticut; and it accordingly ordered that the appellant refund to each of them the amount of tuition and fees paid in excess of the amount paid by resident students for that semester. On December 4, 1972, we noted probable jurisdiction of this appeal. 409 U. S. 1036.

The appellees do not challenge, nor did the District Court invalidate, the option of the State to classify students as resident and nonresident students, thereby obligating nonresident students to pay higher tuition and fees than do bona fide residents. The State's right to make such a classification is unquestioned here. Rather, the appellees attack Connecticut's irreversible and irrebuttable statutory presumption that because a student's legal address was outside the State at the time of his application for admission or at some point during the preceding year, he remains a nonresident for as long as he is a student there. This conclusive presumption, they say, is invalid in that it allows the State to classify as "out-of-state students" those who are, in fact, bona fide residents of the State. The appellees claim that they have a constitutional right to controvert

[3] While the case was pending in the District Court, the Connecticut Legislature passed a bill relating to tuition payments by nonresidents, House Bill No. 5302, which would have repealed the particular portions of the statute that were under constitutional attack. On May 18, 1972, however, the Governor of Connecticut vetoed that bill.

that presumption of nonresidence by presenting evidence that they are bona fide residents of Connecticut. The District Court agreed: "Assuming that it is permissible for the state to impose a heavier burden of tuition and fees on non-resident than on resident students, the state may not classify as 'out of state students' those who do not belong in that class." 346 F. Supp., at 528. We affirm the judgment of the District Court.

Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments. In *Heiner* v. *Donnan*, 285 U. S. 312 (1932), the Court was faced with a constitutional challenge to a federal statute that created a conclusive presumption that gifts made within two years prior to the donor's death were made in contemplation of death, thus requiring payment by his estate of a higher tax. In holding that this irrefutable assumption was so arbitrary and unreasonable as to deprive the taxpayer of his property without due process of law, the Court stated that it had "held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." *Id.*, at 329. See, *e. g.*, *Schlesinger* v. *Wisconsin*, 270 U. S. 230 (1926); *Hoeper* v. *Tax Comm'n*, 284 U. S. 206 (1931). See also *Tot* v. *United States*, 319 U. S. 463, 468–469 (1943); *Leary* v. *United States*, 395 U. S. 6, 29–53 (1969). Cf. *Turner* v. *United States*, 396 U. S. 398, 418–419 (1970).

The more recent case of *Bell* v. *Burson*, 402 U. S. 535 (1971), involved a Georgia statute which provided that if an uninsured motorist was involved in an accident and could not post security for the amount of damages claimed, his driver's license must be suspended without any hearing on the question of fault or responsibility. The Court held that since the State purported to be concerned with fault in suspending a driver's license, it

could not, consistent with procedural due process, conclusively presume fault from the fact that the uninsured motorist was involved in an accident, and could not, therefore, suspend his driver's license without a hearing on that crucial factor.

Likewise, in *Stanley* v. *Illinois*, 405 U. S. 645 (1972), the Court struck down, as violative of the Due Process Clause of the Fourteenth Amendment, Illinois' irrebuttable statutory presumption that all unmarried fathers are unqualified to raise their children. Because of that presumption, the statute required the State, upon the death of the mother, to take custody of all such illegitimate children, without providing any hearing on the father's parental fitness. It may be, the Court said, "that most unmarried fathers are unsuitable and neglectful parents. . . . But all unmarried fathers are not in this category; some are wholly suited to have custody of their children." *Id.*, at 654. Hence, the Court held that the State could not conclusively presume that any individual unmarried father was unfit to raise his children; rather, it was required by the Due Process Clause to provide a hearing on that issue. According to the Court, Illinois "insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing . . . ." *Id.*, at 658.[4]

[4] Moreover, in *Carrington* v. *Rash*, 380 U. S. 89 (1965), the Court held that a permanent irrebuttable presumption of nonresidence violated the Equal Protection Clause of the Fourteenth Amendment. That case involved a provision of the Texas Constitution which prohibited any member of the Armed Forces who entered the service as a resident of another State and then moved his home to Texas during the course of his military duty, from ever satisfying the residence requirement for voting in Texas elections, so long as he remained a member of the Armed Forces. The effect of that provision was to create a conclusive presumption that all

The same considerations obtain here. It may be that most applicants to Connecticut's university system who apply from outside the State or within a year of living out of State have no real intention of becoming Connecticut residents and will never do so. But it is clear that not all of the applicants from out of State inevitably fall in this category. Indeed, in the present case, both appellees possess many of the indicia of Connecticut residency, such as year-round Connecticut homes, Connecticut drivers' licenses, car registrations, voter registrations, etc.; and both were found by the District Court to have become bona fide residents of Connecticut before the 1972 spring semester. Yet, under the State's statutory scheme, neither was permitted any opportunity to demonstrate the bona fides of her Connecticut residency for tuition purposes, and neither will ever have such an opportunity in the future so long as she remains a student.

The State proffers three reasons to justify that permanent irrebuttable presumption. The first is that the State has a valid interest in equalizing the cost of public higher education between Connecticut residents and nonresidents, and that by freezing a student's residential status as of the time he applies, the State ensures that its bona fide in-state students will receive their full subsidy. The State's objective of cost equalization between bona fide residents and nonresidents may well be legitimate, but basing the bona fides of residency solely on where a student lived when he applied for admission

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servicemen who moved to Texas during their military service, even if they became bona fide residents of Texas, nonetheless remained nonresidents for purposes of voting. The Court held that "[b]y forbidding a soldier ever to controvert the presumption of nonresidence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment." *Id.*, at 96. See also *Dunn* v. *Blumstein*, 405 U. S. 330, 349–352 (1972); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969).

to the University is using a criterion wholly unrelated to that objective. As is evident from the situation of the appellees, a student may be a bona fide resident of Connecticut even though he applied to the University from out of State. Thus, Connecticut's conclusive presumption of nonresidence, instead of ensuring that only its bona fide residents receive their full subsidy, ensures that certain of its bona fide residents, such as the appellees, do *not* receive their full subsidy, and can never do so while they remain students.

Second, the State argues that even if a student who applied to the University from out of State may at some point become a bona fide resident of Connecticut, the State can nonetheless reasonably decide to favor with the lower rates only its established residents, whose past tax contributions to the State have been higher. According to the State, the fact that established residents or their parents have supported the State in the past justifies the conclusion that applicants from out of State—who are presumed not to be such established residents—may be denied the lower rates, even if they have become bona fide residents.

Connecticut's statutory scheme, however, makes no distinction on its face between established residents and new residents. Rather, through § 122, the State purports to distinguish, for tuition purposes, between residents and nonresidents by granting the lower rates to the former and denying them to the latter.[5] In these circumstances, the State cannot now seek to justify its classification of certain bona fide residents as nonresidents, on the basis that their Connecticut residency is "new."

Moreover, § 126 would not always operate to effectuate the State's asserted interest. For it is not at all clear that the conclusive presumption required by that section prevents only "new" residents, rather than "es-

[5] See n. 1, *supra*.

tablished" residents, from obtaining the lower tuition rates. For example, a student whose parents were lifelong residents of Connecticut, but who went to college at Harvard, established a legal address there, and applied to the University of Connecticut's graduate school during his senior year, would be permanently classified as an "out of state student," despite his family's status as "established" residents of Connecticut. Similarly, the appellee Kline may herself be a "new" resident of Connecticut; but her husband is an established, lifelong resident, whose past tax contribution to the State, under the State's theory, should entitle his family to the lower rates. Conversely, the State makes no attempt to ensure that those students to whom it does grant in-state status are "established" residents of Connecticut. Any married person, for instance, who moves to Connecticut before applying to the University would be considered a Connecticut resident, even if he has lived there only one day. Thus, even in terms of the State's own asserted interest in favoring established residents over new residents, the provisions of § 126 are so arbitrary as to constitute a denial of due process of law.[6]

[6] But even if we accepted the State's argument that its statutory scheme operates to apportion tuition rates on the basis of old and new residency, that justification itself would give rise to grave problems under the Equal Protection Clause of the Fourteenth Amendment. For in *Shapiro* v. *Thompson, supra,* the Court rejected the contention that a challenged classification could be sustained as an attempt to distinguish between old and new residents on the basis of the contribution they have made to the community through past payment of taxes. That reasoning, the Court stated, "would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services." 394 U. S., at 632–633. Cf. *Carrington* v. *Rash,* 380 U. S., at 96; *Dunn* v. *Blumstein,* 405 U. S., at 354.

The third ground advanced to justify § 126 is that it provides a degree of administrative certainty. The State points to its interest in preventing out-of-state students from coming to Connecticut solely to obtain an education and then claiming Connecticut residence in order to secure the lower tuition and fees. The irrebuttable presumption, the State contends, makes it easier to separate out students who come to the State solely for its educational facilities from true Connecticut residents, by eliminating the need for an individual determination of the bona fides of a person who lived out of State at the time of his application. Such an individual determination, it is said, would not only be an expensive administrative burden, but would also be very difficult to make, since it is hard to evaluate when bona fide residency exists. Without the conclusive presumption, the State argues, it would be almost impossible to prevent out-of-state students from claiming a Connecticut residence merely to obtain the lower rates.

In *Stanley* v. *Illinois, supra,* however, the Court stated that "the Constitution recognizes higher values than speed and efficiency." 405 U. S., at 656. The State's interest in administrative ease and certainty cannot, in and of itself, save the conclusive presumption from invalidity under the Due Process Clause where there are other reasonable and practicable means of establishing the pertinent facts on which the State's objective is premised. In the situation before us, reasonable alternative means for determining bona fide residence are available. Indeed, one such method has already been adopted by Connecticut; after § 126 was invalidated by the District Court, the State established reasonable criteria for evaluating bona fide residence for purposes of tuition and fees at its university system.[7] These criteria,

[7] See *infra,* at 454.

while perhaps more burdensome to apply than an irrebuttable presumption, are certainly sufficient to prevent abuse of the lower, in-state rates by students who come to Connecticut solely to obtain an education.[8]

In sum, since Connecticut purports to be concerned with residency in allocating the rates for tuition and fees in its university system, it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination. Rather, standards of due process require that the State allow such an individual the opportunity to present evidence showing that he is a bona fide resident entitled to the in-state rates. Since § 126 precluded the appellees from ever rebutting the presumption that they were nonresidents of Connecticut, that statute operated to deprive them of a significant amount of their money without due process of law.

We are aware, of course, of the special problems involved in determining the bona fide residence of college students who come from out of State to attend that State's public university. Our holding today should in no wise be taken to mean that Connecticut must classify the students in its university system as residents, for purposes of tuition and fees, just because they go to school there. Nor should our decision be construed to deny a State the right to impose on a student, as one element in demonstrating bona fide residence, a reasonable durational residency requirement, which can be met while in student status.[9] We fully recognize that a State

[8] Cf. *Carrington* v. *Rash, supra,* at 95–96; *Dunn* v. *Blumstein, supra,* at 349–352; *Shapiro* v. *Thompson, supra,* at 636.

[9] In *Starns* v. *Malkerson,* 326 F. Supp. 234 (Minn. 1970), the District Court upheld a regulation of the University of Minnesota

has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis.

We hold only that a permanent irrebuttable presumption of nonresidence—the means adopted by Connecticut to preserve that legitimate interest—is violative of the Due Process Clause, because it provides no opportunity for students who applied from out of State to demonstrate that they have become bona fide Connecticut residents. The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational

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providing that no student could qualify as a resident for tuition purposes unless he had been a bona fide domiciliary of the State for at least a year immediately prior thereto. This Court affirmed summarily. 401 U. S. 985 (1971). Minnesota's one-year durational residency requirement, however, differed in an important respect from the permanent irrebuttable presumption at issue in the present case. Under the regulation involved in *Starns*, a student who applied to the University from out of State could rebut the presumption of nonresidency, after having lived in the State for one year, by presenting sufficient other evidence to show bona fide domicile within Minnesota. In other words, residence within the State for one year, whether or not in student status, was merely one element which Minnesota required to demonstrate bona fide domicile. By contrast, the Connecticut statute prevents a student who applied to the University from out of State, or within a year of living out of State, from ever rebutting the presumption of nonresidence during the entire time that he remains a student, no matter how long he has been a bona fide resident of the State for other purposes. Under Minnesota's durational residency requirement, a student could qualify for in-state rates by living within the State for a year in student status; whereas under Connecticut's scheme, a person who applied from out of State can never so qualify so long as he remains in student status. See also *Kirk* v. *Board of Regents of Univ. of California*, 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969), appeal dismissed, 396 U. S. 554 (1970).

purposes, cannot take advantage of the in-state rates. Indeed, as stated above, such criteria exist; and since § 126 was invalidated, Connecticut, through an official opinion of its Attorney General, has adopted one such reasonable standard for determining the residential status of a student. The Attorney General's opinion states:

> "In reviewing a claim of in-state status, the issue becomes essentially one of domicile. In general, the domicile of an individual is his true, fixed and permanent home and place of habitation. It is the place to which, whenever he is absent, he has the intention of returning. This general statement, however, is difficult of application. Each individual case must be decided on its own particular facts. In reviewing a claim, relevant criteria include year-round residence, voter registration, place of filing tax returns, property ownership, driver's license, car registration, marital status, vacation employment, etc." [10]

Because we hold that the permanent irrebuttable presumption of nonresidence created by subsections (a)(2), (a)(3), and (a)(5) of Conn. Gen. Stat. Rev. § 10–329 (b) (Supp. 1969), as amended by Public Act No. 5, § 126 (June Sess. 1971), violates the Due Process Clause of the Fourteenth Amendment, the judgment of the District Court is affirmed.

It is so ordered.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, concurring.

I join the opinion of the Court except insofar as it suggests that a State may impose a one-year residency

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[10] Opinion of the Attorney General of the State of Connecticut Regarding Non-Resident Tuition, Sept. 6, 1972 (unreported).

requirement as a prerequisite to qualifying for in-state tuition benefits. See *ante,* at 452 and n. 9. That question is not presented by this case since here we deal with a permanent, irrebuttable presumption of nonresidency based on the fact that a student was a nonresident at the time he applied for admission to the state university system. I recognize that in *Starns* v. *Malkerson,* 401 U. S. 985 (1971), we summarily affirmed a district court decision sustaining a one-year residency requirement for receipt of in-state tuition benefits. But I now have serious question as to the validity of that summary decision in light of well-established principles, under the Equal Protection Clause of the Fourteenth Amendment, which limit the States' ability to set residency requirements for the receipt of rights and benefits bestowed on bona fide state residents. See *Dunn* v. *Blumstein,* 405 U. S. 330 (1972); *Shapiro* v. *Thompson,* 394 U. S. 618 (1969). Because the Court finds sufficient basis in the Due Process Clause of the Fourteenth Amendment to dispose of the constitutionality of the Connecticut statute here at issue, it has no occasion to address the serious equal protection questions raised by this and other tuition residency laws. In the absence of full consideration of those equal protection questions, I would leave the validity of a one-year residence requirement for a future case in which the issue is squarely presented.

In addition, I cannot agree with my Brother REHNQUIST's assertion in dissent that the Court's opinion today represents a return to the doctrine of substantive due process. This case involves only the validity of the conclusive presumption of nonresidency erected by the State, and, as such, concerns nothing more than the procedures by which the State determines whether or not a person is a resident for tuition purposes.

MR. JUSTICE WHITE, concurring in the judgment.

In *Starns* v. *Malkerson*, 401 U. S. 985 (1971), a regulation issued by the Board of Regents provided that no student could qualify for the lower, in-state tuition to the University of Minnesota until he had been a bona fide domiciliary of the State for one year. The District Court upheld the law, 326 F. Supp. 234 (Minn. 1970), and we affirmed summarily, although the effect of the Regents' regulation was to prevent an admitted Minnesota domiciliary from being treated as such for a period of one year. I thought the case warranted plenary treatment, but I did not then, nor do I now, disagree with the judgment. Because I have difficulty distinguishing, on due process grounds, whether deemed procedural or substantive or whether put in terms of conclusive presumptions, between the Minnesota one-year requirement and the Connecticut law that, for tuition purposes, does not permit Connecticut residence to be acquired while attending Connecticut schools, I cannot join the Court's opinion.

I concur in the judgment, however, because Connecticut, although it may legally discriminate between its residents and nonresidents for purposes of tuition, here invidiously discriminates among at least three classes of bona fide Connecticut residents. First, there are those unmarried students who have resided in Connecticut one year prior to application or who later reside in Connecticut for a year without going to school. They pay the substantially lower in-state tuition. Second, there are the married students who have a legal address in Connecticut at the time of application. They also pay the lower tuition, whether or not they have resided in Connecticut for a year prior to application. Third, there are the unmarried students whose legal address has been outside Connecticut at some time during the year prior to application but who later become legal residents of

Connecticut, before or after application or before or after matriculation, and remain such for at least one year. These students, although year-long residents, must continue to pay out-of-state tuition for as long as they are in school.

This discrimination between classes of bona fide residents of the State is sought to be justified, as I understand it, on the sole ground that too few students from out of State actually become Connecticut residents to require the State to sort out this small number by investigating the inevitably larger number of residency claims which would be submitted if the rule were otherwise but which for the most part would be bogus.

In *Bell* v. *Burson,* 402 U. S. 535 (1971), under the applicable state law a driver's license could not be revoked without proof of fault, but, upon the occurrence of an accident, the State automatically suspended the license without showing even probable fault and without an opportunity to prove nonfault. The State neither argued nor claimed that there was a more likely than not inference of fault from the mere event of an accident.

In *Carrington* v. *Rash,* 380 U. S. 89 (1965), the State refused those in active military service the opportunity to prove residence in the State and thus their eligibility to vote. The Court struck down this restriction. The State's interest in avoiding the task of verifying claims of residency was insufficiently weighty to warrant interference with the right to vote of the military personnel who had actually become domiciled in the State.

In *Stanley* v. *Illinois,* 405 U. S. 645 (1972), the state standard for separating child and parent was unfitness of parent. Accepting the State's argument that most unwed fathers are unfit, we nevertheless required the State to give those fathers a hearing on their fitness prior to depriving them of the custody of their children. It was administratively convenient for the State to pre-

sume unfitness and so avoid hearings to identify the perhaps smaller number of fit, unwed fathers; but this justification was found insufficient in view of the strong interest of a natural parent in the custody of his child, an interest that we thought came to this Court " 'with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' " *Id.*, at 651, quoting from *Kovacs* v. *Cooper*, 336 U. S. 77, 95 (1949) (Frankfurter, J., concurring). The unwed father's interest was at least cognizable and substantial enough to prohibit the State, in the name of administrative convenience, from denying the unwed father a hearing on parental fitness prior to declaring his child a ward of the State. The same considerations led us to conclude that the unwed father was denied equal protection of the laws.

From these and other cases, such as *Dandridge* v. *Williams*, 397 U. S. 471 (1970); *Reed* v. *Reed*, 404 U. S. 71 (1971); *Frontiero* v. *Richardson*, 411 U. S. 677 (1973); and *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972), it is clear that we employ not just one, or two, but, as my Brother MARSHALL has so ably demonstrated, a "spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause." *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 98–99 (1973) (MARSHALL, J., dissenting). Sometimes we just say the claim is "invidious" and let the matter rest there, as MR. JUSTICE STEWART did, for example, in concurring in the judgment in *Frontiero*. But at other times we sustain the discrimination, if it is justifiable on any conceivable rational basis, or strike it down, unless sustained by some compelling interest of the State, as, for example, when a State imposes a discrimination that burdens or penalizes the exercise of a constitutional right. See, *e. g.*, *Shapiro* v. *Thompson*, 394 U. S. 618 (1969). I am uncomfortable with the dichot-

omy, for it must now be obvious, or has been all along, that, as the Court's assessment of the weight and value of the individual interest escalates, the less likely it is that mere administrative convenience and avoidance of hearings or investigations will be sufficient to justify what otherwise would appear to be irrational discriminations.

Here, it is enough for me that the interest involved is that of obtaining a higher education, that the difference between in-state and out-of-state tuition is substantial, and that the State, without sufficient justification, imposes a one-year residency requirement on some students but not on others, and also refuses, no matter what the circumstances, to permit the requirement to be satisfied through bona fide residence while in school. It is plain enough that the State has only the most attenuated interest in terms of administrative convenience in maintaining this bizarre pattern of discrimination among those who must or must not pay a substantial tuition to the University. The discrimination imposed by the State is invidious and violates the Equal Protection Clause.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE REHNQUIST joins, dissenting.

I find myself unable to join the action taken today because the Court in this case strays from what seem to me sound and established constitutional principles in order to reach what it considers a just result in a particular case; this gives meaning to the ancient warning that "hard cases make bad law." The Court permits this "hard" case to make some very dubious law.

A state university today is an establishment with capital costs of many millions of dollars of investment. Its annual operating costs likewise may run into the millions. Parents and other taxpayers willingly carry this heavy burden because they believe in the values of higher education. It is not narrow provincialism for the State

to think that each State should carry its own educational burdens. Until we redefine our system of government—as we are free to do by constitutionally prescribed means—the States may restrict subsidized education to their own residents. This much the Court recognizes and it likewise recognizes that the statutory scheme under review reasonably tends to support that end.

Commendably, the Court has tried to cast the opinion in the narrowest possible terms, but it seems nonetheless to accomplish a transferrence of the elusive and arbitrary "compelling state interest" concept into the orbit of the Due Process Clause. The Court categorizes the Connecticut statutory classification as a "permanent and irrebuttable presumption"; it explains that this "presumption" leads to unseemly results in this and other isolated cases; and it relies upon the State's stopgap guidelines for determining bona fide residency to demonstrate that "the State has reasonable alternative means of making the crucial determination." This is the language of strict scrutiny. We ought not try to correct "unseemly results" of state statutes by resorting to constitutional adjudication.

Distressingly, the Court applies "strict scrutiny" and invalidates Connecticut's statutory scheme without explaining why the statute impairs a genuine constitutional interest truly worthy of the standard of close judicial scrutiny. The real issue here is not whether holes can be picked in the Connecticut scheme; of course, that is readily done with this "bad" statute. Whether we deal with statutes of Connecticut or of Congress, we can find flaws, gaps, and hard and unseemly results at times. But our function in constitutional adjudication is not to see whether there is some conceivably "less restrictive" alternative to the statutory classifications under review. The Court's task is to explain why the "strict scrutiny" test,

previously confined to other areas, should now in practical effect be read into the Due Process Clause. The drift of *Stanley* v. *Illinois*, 405 U. S. 645 (1972), on which the Court relies heavily, was to apply a similar test, but at least there the Court essayed to explain that the rights of fatherhood and family were regarded as "'essential'" and "'basic civil rights of man,'" *id.*, at 651, and to provide an analytic basis for the result reached. To the same effect was *Bell* v. *Burson*, 402 U. S. 535 (1971), where the Court noted that suspension of a driver's license might impair the pursuit of a livelihood, thereby infringing "important interests of the licensees." *Id.*, at 539. *Carrington* v. *Rash*, 380 U. S. 89 (1965), an equal protection case, involved deprivation of the right to vote, by the Court's, and MR. JUSTICE STEWART's own description, a matter "close to the core of our constitutional system." *Id.*, at 96.*

*Implicit in my dissenting vote, of course, is my disagreement with MR. JUSTICE WHITE's suggestion that the "weight and value" of the appellees' interest in obtaining a higher education require us to pay something less than the usual deference to the judgment of the Connecticut Legislature. If appellees' chances of securing higher education were truly in jeopardy as a result of the tuition differential at issue here, there would at least be an arguable basis for special concern, though for me the *San Antonio* case would provide a serious obstacle to any departure from the traditional "rational basis" test. In this case, there is, in any event, no allegation by either appellee that the higher out-of-state tuition charge does, will, or even may deprive her of the opportunity to attend the University of Connecticut. Thus, try as I may, I find it impossible to understand why the interest of appellees at issue here amounts to any more or any less than the number of dollars they are required to pay in excess of Connecticut's in-state tuition rate. That amount may be "substantial," but the Court has never suggested that financial impact, *per se*, requires abandonment of the "rational basis" test of equal protection review as MR. JUSTICE WHITE suggests. Indeed, I had always thought that a simple financial deprivation was the classic case for judicial deference to legislative choices.

There will be, I fear, some ground for a belief that the Court now engrafts the "close judicial scrutiny" test onto the Due Process Clause whenever we deal with something like "permanent irrebuttable presumptions." But literally thousands of state statutes create classifications permanent in duration, which are less than perfect, as all legislative classifications are, and might be improved on by individualized determinations so as to avoid the untoward results produced here due to the very unusual facts of this case. Both the anomaly present here and the arguable alternatives to it do not differ from those present when, for example, a State provides that a person may not be licensed to practice medicine or law unless he or she is a graduate of an accredited professional graduate school; a perfectly capable practitioner may as a consequence be barred "permanently and irrebuttably" from pursuing his calling, without ever having an opportunity to prove his personal skills. The doctrinal difficulties of the Equal Protection Clause are indeed trying, but today the Court makes an uncharted drift toward complications for the Due Process Clause comparable in scope and seriousness with those we are encountering in the equal protection area. Can this be what we are headed for?

The pressure of today's holding may well push the States to enact reciprocal statutes to the end that Connecticut will undertake to admit as "resident" students only those students from other States that give the same status to Connecticut residents. When a State allocates a large share of its resources to create and maintain a university whose quality is found attractive to many students from other States, its very success and stature may well operate to cripple it because then, not unnaturally, it will be flooded with applications from students from afar. Perhaps on less "high ground" students who favor winter sports will flock to the Northeast and

Northwest and the sun worshipers will head South. Is the Court willing to say that Connecticut may not grant partial scholarships to persons who have attended a Connecticut secondary school for—let us say—at least one full school year and then set nonresident tuition as it does now? We should not be surprised at the natural response of States which, having placed high value on universities, having developed great institutions at large cost, believe that other States should do the same and therefore seek ways to keep the institution in being for its own citizens. I do not suggest these things ought to be done or that they are desirable; rather, I submit, when we examine a statute of a State we should lay aside preferences for or against what the State does in a few particular or isolated cases and look only to what the Constitution forbids a State to do, so as to avoid putting pressure on the States to engage in legislative devices to escape from the hobbles we place on them on matters of purely state concern.

The urge to cure every disadvantage human beings can experience exerts an inexorable pressure to expand judicial doctrine. But that urge should not move the Court to erect standards that are unrealistic and indeed unexplained for evaluating the constitutionality of state statutes.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, dissenting.

The Court's opinion relegates to the limbo of unconstitutionality a Connecticut law that requires higher tuition from those who come from out of State to attend its state universities than from those who come from within the State. The opinion accomplishes this result by a highly theoretical analysis that relies heavily on notions of substantive due process that have been authoritatively repudiated by subsequent decisions of the Court.

Believing as I do that the Connecticut statutory scheme is a constitutionally permissible means of dealing with an increasingly acute problem facing state systems of higher education, I dissent.

This country's system of higher education presently faces a serious crisis, produced in part by escalating costs of furnishing educational services and in part by sharply increased demands for those services. Because state systems have available to them state financial resources that are not available to private institutions, they may find it relatively easier to grapple with the financial aspect of this crisis. But for this very reason, States have generally felt that state resources should be devoted, at least in large part, to the education of children of the State's own residents, and that those who come from elsewhere to attend a state university should have to make a more substantial contribution toward the full costs of the education they would receive than the all but nominal tuition required of those who come from within the State.

One way to accomplish such a differentiation would be to make the tuition differential turn on whether or not the student was a "resident" or "nonresident" of the State at the time tuition is paid. The Court, at least by implication, concedes that such a differentiation would violate no command of the Constitution, but even a casual examination of how such a plan would operate indicates why it did not commend itself to the Connecticut Legislature. The very act of enrolling in a Connecticut university with the intention of completing a program of studies leading to a degree necessitates the physical presence of the student in the State of Connecticut. Additional indicia of residency, by which the Court apparently sets great store—obtaining a Connecticut motor vehicle registration or driver's license, registering to vote in Connecticut—impose no significant burden

on the out-of-state student in comparison with the thousands of dollars he will save in tuition and fees during the pursuit of a four-year course in undergraduate studies. Thus, what the Court concedes to the States in the way of distinguishing between resident and nonresident students, while perhaps a valuable bit of authority in issuing fishing and hunting licenses, is all but useless in making students who come from out of State pay even a portion of their fair share of the cost of the education that they seek to receive in Connecticut state universities.

The system to which Connecticut has turned is one that limits the virtually complete subsidy that is afforded to those who pay in-state tuition to those who resided in Connecticut at the time of applying for admission, and whose residence in Connecticut did not result from their desire to attend the state universities. Some such plan must be devised by any State that wishes to differentiate between those who have paid taxes to the State over a period of years in order to support the university, and those who have simply come to the State in order to attend the university. Since institutions of higher learning are not built in a year or in a decade, such a distinction strikes me as entirely rational, and I do not understand the Court to hold otherwise.

Understandably, any such general principle will have a number of specific applications, and just as understandably a capable lawyer will be able to focus on one or more of these specific applications that appear to diverge from the principle that the State is attempting to enforce. The Court's opinion deals with the situation of the particular litigants here involved, doubtless chosen with an eye to illustrating the Connecticut system at its worst, and with still other hypothetical examples upon which it expatiates during the course of its opinion. But the fact that a generally valid rule may

have rough edges around its perimeter does not make it unconstitutional under the Due Process Clause of the Fourteenth Amendment:

> "[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 487–488 (1955).

Throughout the Court's opinion are found references to the "irrebuttable" presumption as to residency created by the Connecticut statutes. But a fair reading of these laws indicates that Connecticut has not chosen to define eligibility for a state-subsidized education in terms of "residency" at the moment that the applicant seeks admission to the university system, but instead has insisted that the applicant have some prior connection with the State of Connecticut independent of the desire to attend a state-supported university. Thus, it would not satisfy Connecticut's goals in seeking to subsidize the education of Connecticut's young people in Connecticut state universities to impose a classic residency test as of the moment of entry into the system of higher education. All students, and not only those with substantial Connecticut connections, will be present in Connecticut on this date, and those who have been astute enough to consult counsel will have obtained Connecticut drivers' licenses, registered their cars in Connecticut, and registered to vote in Connecticut.

Meaningful differentiation between children of families who have supported the state educational system by payment of taxes to the State of Connecticut, and children from families who have not done this, would be impossible if the test were residency as of the date of

admission, or the date on which tuition is due, at least as the Court enunciates such a test. But this is not what Connecticut tried to do, and, as I read the Court's opinion, Connecticut is not limited to the imposition of such an easily circumvented test. For the Court reaffirms *Starns* v. *Malkerson,* 326 F. Supp. 234 (Minn. 1970), aff'd, 401 U. S. 985 (1971), in which the State of Minnesota had by regulation provided that no student could qualify as a resident for tuition purposes unless he had been a bona fide domiciliary of the State for at least a year immediately prior thereto. A regulation such as Minnesota's enables the State partially to maintain the distinction that Connecticut has sought to protect here. The Court indicates that the critical distinction between the Minnesota regulation and the Connecticut statute is that the Minnesota regulation operated to fix nonresidency only for the first year of attendance at the university. But this supposed distinction merely highlights the error in the Court's approach to this entire problem. Minnesota was no more concerned during the first year than is Connecticut with "residency" as that term is used in other legal contexts. One who had his vehicle licensed in Minnesota, obtained a Minnesota driver's license, and registered to vote in Minnesota could make the same attack on the "irrebuttable" presumption of residency involved in *Starns* as these appellees do on the Connecticut statute. The Court's response is that while Minnesota's fixing of residency as of a date prior to application endured for only one year, Connecticut's endures for four years. This is admittedly a factual difference, but one may read the Court's opinion in vain to ascertain why it is a difference of constitutional significance.

The majority's reliance on cases such as *Heiner* v. *Donnan,* 285 U. S. 312 (1932), harks back to a day when the principles of substantive due process had reached

their zenith in this Court. Later and sounder cases thoroughly repudiated these principles in large part. Ten years ago, the Court reviewed these doctrines in *Ferguson* v. *Skrupa*, 372 U. S. 726, 730 (1963), and made the following observation:

> "The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns,* and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned . . . with the wisdom, need, or appropriateness of the legislation.'"

The Court's highly abstract and theoretical analysis of this practical problem leads to a conclusion that is contrary to the teaching of *Ferguson, supra.*

The typical 18-year-old entering college as a freshman, doubtless typifying the largest group of entering students in Connecticut as elsewhere, has in most cases made little or no contribution by way of tax payment to the cost of his public higher education whether it be in Connecticut or elsewhere. More likely it is his parents, themselves long past college age, who have supported the state universities over a period of years with the thought that they would eventually realize some return from this involuntary investment in the form of in-state tuition for their own children who sought to attend a state university. The State of Connecticut has sought to allow this hope to be realized through the distinction that it has made between those who are to pay nominal tuition and those who are to pay the more substantial

out-of-state tuition. To the extent that today's decision requires students with no previous connection with the State of Connecticut to be admitted to that State's university system as in-state students, upon obtaining a driver's license and registering to vote, it means that longtime Connecticut residents will not only continue to support the state university system, but that they will be required to support it in increased measure in order to help subsidize the education of nonresidents. The Court's invalidation of the Connecticut plan is quite inconsistent with doctrines of substantive due process that have obtained in this Court for at least a decade, and to which I would continue to adhere.

WARDIUS *v.* OREGON

CERTIORARI TO THE SUPREME COURT OF OREGON

No. 71-6042. Argued January 10, 1973—Decided June 11, 1973

At petitioner's criminal trial, a witness' alibi evidence was struck as a sanction for petitioner's failure to file a notice of alibi in accordance with Oregon's statutory requirement, and petitioner himself was not allowed to give alibi testimony. Following petitioner's conviction the appellate court, affirming, rejected his constitutional challenge to the state statute, which grants no discovery rights to criminal defendants. *Held:* Reciprocal discovery is required by fundamental fairness and it is insufficient that although the statute does not require it, the State might grant reciprocal discovery in a given case. In the absence of fair notice that petitioner will have an opportunity to discover the State's rebuttal witnesses, petitioner cannot, consistently with due process requirements, be required to reveal his alibi defense. Pp. 473–479.

Reversed and remanded; see 6 Ore. App. 391, 487 P. 2d 1380.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BURGER, C. J., concurred in the result. DOUGLAS, J., filed an opinion concurring in the result, *post*, p. 479.

J. Marvin Kuhn argued the cause and filed a brief for petitioner.

W. Michael Gillette, Assistant Attorney General of Oregon, argued the cause for respondent. With him on the briefs were *Lee Johnson*, Attorney General, *John W. Osburn*, Solicitor General, and *John H. Clough*, Assistant Attorney General.*

**Jerome B. Falk, Jr.*, filed a brief for Virgil Jenkins as *amicus curiae* urging reversal.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case involves important questions concerning the right of a defendant forced to comply with a "notice-of-alibi" rule to reciprocal discovery.

In *Williams* v. *Florida*, 399 U. S. 78 (1970), we upheld the constitutionality of Florida's notice-of-alibi rule which required criminal defendants intending to rely on an alibi defense to notify the prosecution of the place at which they claimed to be at the time in question, and of the names and addresses of witnesses they intended to call in support of the alibi.[1] In so holding, however, we emphasized that the constitutionality of such rules might depend on "whether the defendant enjoys reciprocal discovery against the State." *Id.*, at 82 n. 11.[2]

In the case presently before us, Oregon prevented a criminal defendant from introducing any evidence to support his alibi defense as a sanction for his failure to comply with a notice-of-alibi rule which, on its face,

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[1] The requirement was attacked as a violation of the defendant's due process right to a fair trial and an invasion of his privilege against self-incriminaton. But the Court found that "[g]iven the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate." 399 U. S., at 81. Moreover, we held that "the privilege against self-incrimination is not violated by a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses." *Id.*, at 83.

[2] The Florida rule provided:

"'Not less than five days after receipt of defendant's witness list, or such other times as the court may direct, the prosecuting attorney shall file and serve upon the defendant the names and addresses (as particularly as are known to the prosecuting attorney) of the witnesses the State proposes to offer in rebuttal to discredit the defendant's alibi at the trial of the cause.'" See 399 U. S., at 104.

made no provision for reciprocal discovery.[3] The case thus squarely presents the question left open in *Williams*, and we granted certiorari so that this question could be resolved. 406 U. S. 957 (1972).

We hold that the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants. Since the Oregon statute did not provide for reciprocal discovery, it was error for the court below to enforce it against petitioner, and his conviction must be reversed.[4]

I

On May 22, 1970, petitioner was indicted under Ore. Rev. Stat. § 474.020 for unlawful sale of narcotics. The sale allegedly occurred the previous day. At trial, after the State had concluded its case, petitioner called one

[3] Ore. Rev. Stat. § 135.875 provides:

"(1) If the defendant in a criminal action proposes to rely in any way on alibi evidence, he shall, not less than five days before the trial of the cause, file and serve upon the district attorney a written notice of his purpose to offer such evidence, which notice shall state specifically the place or places where the defendant claims to have been at the time or times of the alleged offense together with the name and residence or business address of each witness upon whom the defendant intends to rely for alibi evidence. If the defendant fails to file and serve such notice, he shall not be permitted to introduce alibi evidence at the trial of the cause unless the court for good cause orders otherwise.

"(2) As used in this section, 'alibi evidence' means evidence that the defendant in a criminal action was, at the time of commission of the alleged offense, at a place other than the place where such offense was committed."

[4] Petitioner also argues that even if Oregon's notice-of-alibi rule were valid, it could not be enforced by excluding either his own testimony or the testimony of supporting witnesses at trial. But in light of our holding that Oregon's rule is facially invalid, we express no view as to whether a valid rule could be so enforced. Cf. *Williams* v. *Florida*, *supra*, at 83 n. 14.

Colleen McFadden who testified that on the night in question, she had been with petitioner at a drive-in movie. The prosecutor thereupon brought to the judge's attention petitioner's failure to file a notice of alibi, and after hearing argument the trial judge granted the State's motion to strike McFadden's testimony because of this failure. Petitioner himself then took the stand and attempted to testify that he was at the drive-in with McFadden at the time when the State alleged the sale occurred. Once again, however, the State objected and the trial judge again refused to permit the evidence.

Petitioner was convicted as charged and sentenced to 18 months' imprisonment. On appeal, the Oregon Court of Appeals rejected petitioner's contentions that the Oregon statute was unconstitutional in the absence of reciprocal discovery rights and that the exclusion sanction abridged his right to testify in his own behalf and his right to compulsory process. 6 Ore. App. 391, 487 P. 2d 1380 (1971). In an unreported order, the Oregon Supreme Court denied petitioner's petition to review. See App. 21.

II

Notice-of-alibi rules, now in use in a large and growing number of States,[5] are based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial. See, *e. g.*, Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 Wash. U. L. Q. 279; American Bar Association Project on Standards for Criminal Justice, Discovery and Procedure Before

[5] See *Id.*, at 82 n. 11; Note, The Preclusion Sanction—A Violation of the Constitutional Right to Present a Defense, 81 Yale L. J. 1342 n. 4 (1972).

Trial 23–43 (Approved Draft 1970); Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L. J. 1149 (1960). The growth of such discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system. As we recognized in *Williams*, nothing in the Due Process Clause precludes States from experimenting with systems of broad discovery designed to achieve these goals. "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as 'due process' is concerned, for [a rule] which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." 399 U. S., at 82 (footnote omitted).

Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, but cf. *Brady* v. *Maryland*, 373 U. S. 83 (1963), it does speak to the balance of forces between the accused and his accuser. Cf. *In re Winship*, 397 U. S. 358, 361–364 (1970).[6] The *Williams* Court was therefore careful to note that "Florida law provides for liberal discovery by the defendant against the State, and the notice-of-alibi rule is itself carefully hedged with reciprocal duties requiring state disclosure to the defend-

[6] This Court has therefore been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial. See, *e. g.*, *Washington* v. *Texas*, 388 U. S. 14, 22 (1967); *Gideon* v. *Wainwright*, 372 U. S. 335, 344 (1963). Cf. Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L. J. 1149, 1180–1192 (1960).

ant." 399 U. S., at 81 (footnote omitted). The same cannot be said of Oregon law. As the State conceded at oral argument, see Tr. of Oral Arg. 19, Oregon grants no discovery rights to criminal defendants, and, indeed, does not even provide defendants with bills of particulars.[7] More significantly, Oregon, unlike Florida, has no provision which requires the State to reveal the names and addresses of witnesses it plans to use to refute an alibi defense.[8]

We do not suggest that the Due Process Clause of its own force requires Oregon to adopt such provisions. Cf. *United States* v. *Augenblick*, 393 U. S. 348 (1969); *Cicenia* v. *Lagay*, 357 U. S. 504 (1958). But we do hold that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses.[9]

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[7] As the Oregon Court of Appeals has recently pointed out, "Oregon's criminal code is almost completely lacking in pretrial discovery procedures." *State* v. *Kelsaw*, 289 Ore. App. 295, 502 P. 2d 278, 280–281 (1972), pet. for cert. pending, No. 72–6012.

[8] The only discovery rights Oregon appears to permit are the rights to view written statements made by state witnesses and by the defendant, in the hands of the police. See *State* v. *Foster*, 242 Ore. 101, 407 P. 2d 901 (1965); Ore. Rev. Stat. §§ 133.750, 133.755. Cf. *State* v. *Kelsaw*, *supra*.

[9] Indeed, the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor. As one commentator has noted:

"Besides greater financial and staff resources with which to investigate and scientifically analyze evidence, the prosecutor has a number of tactical advantages. First, he begins his investigation shortly after the crime has been committed when physical evidence is more likely to be found and when witnesses are more apt to remember events. Only after the prosecutor has gathered sufficient evidence is the defendant informed of the charges against him; by

It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.

Indeed, neither the respondent nor the Oregon Court of Appeals contests these principles. Nor does the State suggest any significant governmental interests which might support the lack of reciprocity. Instead, respondent has chosen to rest its case on a procedural point. While conceding that Oregon law fails to provide for reciprocal discovery on its face, the State contends that if petitioner had given notice of his alibi defense, the state courts might have read the Oregon statute as requiring the State to give the petitioner the names and addresses of state witnesses used to refute the alibi defense. Since petitioner failed to give notice, his alibi defense was not permitted and there were, therefore, no state rebuttal witnesses whose testimony tended to disprove the alibi. Since no such testimony was intro-

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the time the defendant or his attorney begins any investigation into the facts of the case, the trail is not only cold, but a diligent prosecutor will have removed much of the evidence from the field. In addition to the advantage of timing, the prosecutor may compel people, including the defendant, to cooperate. The defendant may be questioned within limits, and if arrested his person may be searched. He may also be compelled to participate in various nontestimonial identification procedures. The prosecutor may force third persons to cooperate through the use of grand juries and may issue subpoenas requiring appearance before prosecutorial investigatory boards. With probable cause the police may search private areas and seize evidence and may tap telephone conversations. They may use undercover agents and have access to vast amounts of information in government files. Finally, respect for government authority will cause many people to cooperate with the police or prosecutor voluntarily when they might not cooperate with the defendant." Note, Prosecutorial Discovery under Proposed Rule 16, 85 Harv. L. Rev. 994, 1018–1019 (1972) (footnotes omitted).

duced, respondent argues that Oregon's willingness to permit reciprocal discovery remains untested. The State says, in effect, that petitioner should not be permitted to litigate the reciprocity issue in the abstract in federal court after bypassing an opportunity to contest the issue concretely before the state judiciary.[10]

It is, of course, true that the Oregon courts are the final arbiters of the State's own law, and we cannot predict what the state court might have done had it been faced with a defendant who had given the required notice of alibi and then sought reciprocal discovery rights. But it is this very lack of predictability which ultimately defeats the State's argument. At the time petitioner was forced to decide whether or not to reveal his alibi defense to the prosecution, he had to deal with the statute as written with no way of knowing how it might subsequently be interpreted. Nor could he retract the information once provided should it turn out later that the hoped-for reciprocal discovery rights were not granted.

For this reason, had petitioner challenged the lack of reciprocity by giving notice and then demanding discovery, he would have done so at considerable risk. To be sure, the state court might have construed the Oregon

[10] Before this Court, respondent presses the related argument that petitioner failed to object to the exclusion of his alibi testimony at trial and that his conviction therefore rests on an independent state procedural ground. See Brief for Respondent 5 n. 2. But, as the transcript makes clear, the issue arose when the trial court sustained the State's objection to introduction of the alibi testimony. Petitioner then proceeded to make an "offer of proof" in order to protect the record on appeal. Respondent cites us to no Oregon cases which would require petitioner to object to the sustaining of an objection in this context, and the state appellate court's willingness to reach the merits of petitioner's federal claims provides convincing proof that the judgment does not rest on adequate state grounds. See *Warden* v. *Hayden*, 387 U. S. 294, 297 n. 3 (1967).

statutes so as to save the constitutionality of the notice requirement and granted reciprocal discovery rights. But the state court would also have had the option of reading state law as precluding reciprocal discovery. If the court adopted this latter alternative, it would have had to strike down the notice-of-alibi requirement. But petitioner would have had only a Pyrrhic victory, since once having given the State his alibi information, he could not have retracted it. Thus, under this scenario, even though the notice-of-alibi rule would have been invalidated, the State would still have had the benefit of nonreciprocal discovery rights in petitioner's case—the very result which petitioner wishes to avoid by challenging the rule.

The statute as written did not provide for reciprocal discovery, and petitioner cannot be faulted for taking the legislature at its word.[11] Indeed, even at this stage of the proceedings, the respondent has made no representation that the State would in fact provide reciprocal discovery rights to a defendant who complied with the notice-of-alibi scheme. Respondent says only that the State *might* have granted such rights.[12] But the

[11] Nor did petitioner's attorney rest entirely on his own reading of Oregon's discovery provisions. As the attorney argued at trial,

"Several weeks ago this came up again—this came up in the Circuit Court here with Judge Perry, and Judge Perry allowed the alibi testimony in based upon [*Williams* v. *Florida*] and said that he at that time, based on our statute and based on this opinion, that he didn't feel that our criminal code and our statute should allow a substantive evidence [*sic*] that the defendant might have to be kept out due to this, and that is the reason that notice was not given. I relied somewhat upon that and my own interpretation of this case also." App. 6.

[12] The State cites us to *State* v. *Kelsaw, supra,* a recent Oregon Court of Appeals decision holding that a defendant must be given reciprocal information as to the time and place of the alleged offense before he can be required to comply with the notice-of-alibi rule. But

State cannot constitutionally force compliance with its scheme on the basis of a totally unsubstantiated possibility that the statute might be read in a manner contrary to its plain language. Thus, in the absence of fair notice that he would have an opportunity to discover the State's rebuttal witnesses, petitioner cannot be compelled to reveal his alibi defense.

Since the trial court erred and since there is a substantial possibility that its error may have infected the verdict, the conviction must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

THE CHIEF JUSTICE concurs in the result.

MR. JUSTICE DOUGLAS, concurring in the result.

In *Williams* v. *Florida*, 399 U. S. 78, 106, I joined Mr. Justice Black in dissent from that part of the Court's decision which upheld the constitutionality of Florida's "notice of alibi" rule. We concluded that the decision was "a radical and dangerous departure from the historical and constitutionally guaranteed right of a defendant in a criminal case to remain completely silent, requiring the State to prove its case without any assistance of any kind from the defendant himself." *Id.*, at 108. One need not go far for the textual support for this position. The Fifth Amendment, written with the inquisitorial practices of the Star Chamber firmly in mind, provides that "[n]o person . . . shall be compelled . . . to be a witness against himself." It seems

merely informing the defendant of the time and place of the crime does not approach the sort of reciprocity which due process demands. Moreover, in view of the fact that *Kelsaw* was decided after petitioner's trial, it cannot be suggested that the decision gave him notice that even this limited reciprocity would be granted.

difficult to quarrel with the conclusion that a "notice of alibi" provision contravenes this clear mandate, for the State would see no need for the rule unless it believed that such notice would ease its burden of proving its case or increase the efficiency of its presentation. In either case, the defendant has been compelled to aid the State in his prosecution.

The Court views the growth of "such discovery devices" as a "salutary development" because it increases the evidence available to both parties. *Ante*, at 474. This development, however, has altered the balance struck by the Constitution. The Bill of Rights does not envision an adversary proceeding between two equal parties. If that were so, we might well benefit from procedures patterned after the Rules of the Marquis of Queensberry. But, the Constitution recognized the awesome power of indictment and the virtually limitless resources of government investigators. Much of the Bill of Rights is designed to redress the advantage that inheres in a government prosecution. It is not for the Court to change that balance. See *Williams* v. *Florida*, *supra*, at 111–114 (Black, J., dissenting).

I agree with the Court that petitioner's conviction must be reversed, but for the reasons stated by Mr. Justice Black in his dissent in *Williams*. To reverse it because of uncertainty as to the presence of reciprocal discovery is not to take the Constitution as written but to embellish it in the manner of the old masters of substantive due process.

MATTZ *v.* ARNETT, DIRECTOR, DEPARTMENT OF FISH AND GAME

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

No. 71–1182. Argued March 27–28, 1973—Decided June 11, 1973

Petitioner, a Yurok, or Klamath River, Indian, intervened in a forfeiture proceeding, seeking the return of five gill nets confiscated by a California game warden. He alleged that the nets were seized in Indian country, within the meaning of 18 U. S. C. § 1151, and that the state statutes prohibiting their use did not apply to him. The state trial court found that the Klamath River Reservation in 1892 "for all practical purposes almost immediately lost its identity," and concluded that the area was not Indian country. The State Court of Appeal affirmed, holding that since the area had been opened for unrestricted homestead entry in 1892, the earlier reservation status of the land had terminated. Indian country is defined by § 1151 as including "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent." The Klamath River Reservation was established by Executive Order in 1855 and included the area in question. In 1891, by Executive Order, the Klamath River Reservation was made part of the Hoopa Valley Reservation. The Act of June 17, 1892, provided that "all of the lands embraced in what was Klamath River Reservation" reserved under the 1855 Executive Order, are "declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights . . . *Provided*, That any Indian now located upon said reservation may, at any time within one year . . . apply to the Secretary of the Interior for an allotment of land . . . . And the Secretary of the Interior may reserve from settlement, entry, or purchase any tract . . . upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians." The Act further provided that proceeds from the sale of the lands "shall constitute a fund . . . for the maintenance and education of the Indians now residing on said lands and their children." *Held:* The Klamath River Reservation was not

terminated by the Act of June 17, 1892, and the land within the reservation boundaries is still Indian country, within the meaning of 18 U. S. C. § 1151. Pp. 494–506.

(a) The allotment provisions of the 1892 Act, rather than indicating an intention to terminate the reservation, are completely consistent with continued reservation status. *Seymour* v. *Superintendent*, 368 U. S. 351. Pp. 496–497.

(b) The reference in the Act to the Klamath River Reservation in the past tense did not manifest a congressional purpose to terminate the reservation, but was merely a convenient way of identifying the land, which had just recently been included in the Hoopa Valley Reservation. Pp. 498–499.

(c) The Act's legislative history does not support the view that the reservation was terminated, but by contrast with the final enactment, it compels the conclusion that efforts to terminate by denying allotments to the Indians failed completely. Pp. 499–504.

(d) A congressional determination to terminate a reservation must be expressed on the face of the statute or be clear from the surrounding circumstances and legislative history, neither of which obtained here. Pp. 504–505.

(e) The conclusion that the 1892 Act did not terminate the Reservation is reinforced by repeated recognition thereafter by the Department of the Interior and by the Congress. Congress has recognized the reservation's continued existence by extending, in 1942, the period of trust allotments, and in 1958, by restoring to tribal ownership certain vacant and undisposed-of ceded lands in the reservation. P. 505.

20 Cal. App. 3d 729, 97 Cal. Rptr. 894, reversed and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Lee J. Sclar argued the cause and filed briefs for petitioner.

Roderick Walston, Deputy Attorney General of California, argued the cause for respondent. With him on the briefs were *Evelle J. Younger*, Attorney General, and *Carl Boronkay*, Assistant Attorney General.

Harry R. Sachse argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief

were *Solicitor General Griswold, Assistant Attorney General Frizzell, Carl Strass,* and *Glen R. Goodsell.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Our decision in this case turns on the resolution of the narrow question whether the Klamath River Indian Reservation in northern California was terminated by Act of Congress or whether it remains "Indian country," within the meaning of 18 U. S. C. § 1151.[1] When established, the reservation was described as "a strip of territory commencing at the Pacific Ocean and extending 1 mile in width on each side of the Klamath River"

[1] Title 18 U. S. C. § 1151 defines the term "Indian country" to include, *inter alia,* "all lands within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent . . . ."

Title 18 U. S. C. § 1162 (a) provides that, with respect to Indian country within California, that State "shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country . . . to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State . . . , and the criminal laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State . . . ." Section 1162 (b) provides, however, "Nothing in this section . . . shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

Finally, the California Fish & Game Code § 12300 (Supp. 1973), reads:

"Irrespective of any other provision of law, the provisions of this code are not applicable to California Indians whose names are inscribed upon the tribal rolls, while on the reservation of such tribe and under those circumstances in this State where the code was not applicable to them immediately prior to the effective date of Public Law 280, Chapter 505, First Session, 1953, 83d Congress of the United States [18 U. S. C. § 1162]."

for a distance of approximately 20 miles, encompassing an area not exceeding 25,000 acres. This description is taken from President Franklin Pierce's Executive Order issued November 16, 1855, pursuant to the authority granted by the Act of March 3, 1853, 10 Stat. 226, 238, and the Act of March 3, 1855, 10 Stat. 686, 699.[2]

Petitioner Raymond Mattz is a Yurok, or Klamath River, Indian who, since the age of nine, regularly fished, as his grandfather did before him, with dip, gill, and trigger nets, at a location called Brooks Riffle on the Klamath River. On September 24, 1969, a California game warden confiscated five gill nets owned by Mattz. The nets were stored near Brooks Riffle, approximately 200 feet from the river, and within 20 miles of the river's mouth.

The respondent Director of the Department of Fish and Game instituted a forfeiture proceeding in state court. Mattz intervened and asked for the return of his nets. He alleged, among other things, that he was an enrolled member of the Yurok Tribe, that the nets were seized within Indian country, and that the state statutes prohibiting the use of gill nets, Cal. Fish & Game Code §§ 8664, 8686, and 8630, therefore were inapplicable to him. The state trial court, relying on *Elser* v. *Gill Net Number One*, 246 Cal. App. 2d 30, 54 Cal. Rptr. 568 (1966), found that the Klamath River Reservation in 1892 "for all practical purposes almost immediately lost its identity,"[3] and concluded that the area where the

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[2] The Executive Order is reproduced in 1 C. Kappler, Indian Affairs—Laws and Treaties 817 (1904) (hereinafter Kappler).

At the end of this opinion, as the Appendix, is a map of the Klamath River Reservation. The area described in the text is indicated as the "Old Klamath River Reservation."

[3] See Pet. for Cert., App. B 4–5.

nets were seized was not Indian country. The court thereby disposed of petitioner's primary defense to the forfeiture. It did not reach other issues bearing upon the application of the California statutes to Indian country and the existence of Indian fishing rights there.

On appeal, the State Court of Appeal affirmed, holding that, inasmuch as the area in question had been opened for unrestricted homestead entry in 1892, the earlier reservation status of the land had terminated. 20 Cal. App. 3d 729, 97 Cal. Rptr. 894 (1971). The Supreme Court of California, one judge dissenting, denied a petition for hearing. See 20 Cal. App. 3d, at 735, 97 Cal. Rptr., at 898. We granted certiorari, 409 U. S. 1124 (1973), because the judgments of the state courts appeared to be in conflict with applicable decisions of this Court.

We now reverse. The reversal, of course, does not dispose of the underlying forfeiture issue. On remand, the questions relating to the existence of Mattz' fishing rights and to the applicability of California law notwithstanding reservation status will be addressed. We intimate no opinion on those issues.

I

While the current reservation status of the Klamath River Reservation turns primarily upon the effect of an 1892 Act of Congress which opened the reservation land for settlement, the meaning and effect of that Act cannot be determined without some reference to the Yurok Tribe and the history of the reservation between 1855 and 1892.

The Yurok Indians apparently resided in the area of the lower Klamath River for a substantial period before 1855 when the Klamath River Reservation was established. Little is known of their prior history. There are sources, however, that provide us with relatively

detailed information about the tribe, its culture, living conditions, and customs for the period following 1855.[4] That the tribe had inhabited the lower Klamath River well before 1855 is suggested by the name. Yurok means "down the river." The names of the neighboring tribes, the Karok and the Modok, mean, respectively, "up the river" and "head of the river," and these appellations, as would be expected, coincide with the respective homelands. Powers 19; Kroeber 15.[5]

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[4] A. Kroeber, Handbook of the Indians of California, cc. 1–4, published as Bulletin 78, Bureau of American Ethnology 1–97 (1925) (hereinafter Kroeber); S. Powers, Tribes of California, cc. 4 and 5, published as 3 Contributions to North American Ethnology 44–64 (1877) (hereinafter Powers). Various Annual Reports of the Commissioner of Indian Affairs provide further information; see, for example, the 1856 Report of the Commissioner of Indian Affairs 249–250 (hereinafter Report).

[5] Kroeber, in the preface to his work, suggests that the factual material contained in Powers' manuscript is subject to some criticism. Kroeber's reference to Powers deserves reproduction in full here:

"I should not close without expressing my sincere appreciation of my one predecessor in this field, the late Stephen Powers, well known for his classic 'Tribes of California,' one of the most remarkable reports ever printed by any government. Powers was a journalist by profession and it is true that his ethnology is often of the crudest. Probably the majority of his statements are inaccurate, many are misleading, and a very fair proportion are without any foundation or positively erroneous. He possessed, however, an astoundingly quick and vivid sympathy, a power of observation as keen as it was untrained, and an invariably spirited gift of portrayal that rises at times into the realm of the sheerly fascinating. Anthropologically his great service lies in the fact that with all the looseness of his data and method he was able to a greater degree than anyone before or after him to seize and fix the salient qualities of the mentality of the people he described. The ethnologist may therefore by turns writhe and smile as he fingers Powers's pages, but for the broad outlines of the culture of the California Indian, for its values with all their high lights and shadows, he can still do no better than consult the book. With

By the Act of March 3, 1853, 10 Stat. 238, the President was "authorized to make five military reservations from the public domain in the State of California or the Territories of Utah and New Mexico bordering on said State, for Indian purposes." The Act of March 3, 1855, 10 Stat. 699, appropriated funds for "collecting, removing, and subsisting the Indians of California . . . on two additional military reservations, to be selected as heretofore . . . *Provided,* That the President may enlarge the quantity of reservations heretofore selected, equal to those hereby provided for." President Pierce then issued his order of November 16, 1855, specifying the Klamath River Reservation and stating, "Let the reservation be made, as proposed." Kappler 817.

The site was ideally selected for the Yuroks. They had lived in the area; the arable land, although limited, was "peculiarly adapted to the growth of vegetables," 1856 Report 238; and the river, which ran through a canyon its entire length, abounded in salmon and other fish. *Ibid.;* 1858 Report 286.[6]

In 1861 nearly all the arable lands on the Klamath River Reservation were destroyed by a freshet, and, upon recommendation of the local Indian agent, some of the Indians were removed to the Smith River Reservation, established for that purpose in 1862. Only a small number of Yuroks moved to the new reservation, however, and nearly all those who did move returned within a few

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all its flimsy texture and slovenly edges, it will always remain the best introduction to the subject." Kroeber ix.

[6] Of this area one agent stated, "No place can be found so well adapted to these Indians, and to which they themselves are so well adapted, as this very spot. No possessions of the Government can be better spared to them. No territory offers more to these Indians and very little territory offers less to the white man. The issue of their removal seems to disappear." 1885 Report 266.

years to the Klamath River. *Crichton* v. *Shelton*, 33 I. D. 205, 208 (1904); Kappler 830; 1864 Report 122. The Smith River Reservation was then discontinued. Act of July 27, 1868, 15 Stat. 198, 221.

The total Yurok population on the Klamath River Reservation in the 1860's cannot be stated with precision. In 1852, based in part on a rough census made by a trader, it was estimated at 2,500. Kroeber 16–17.[7]

[7] It is interesting to note that Powers believed the Yurok population at one time far exceeded 2,500 and perhaps numbered over 5,000. This was, as Powers stated, "before the whites had come among them, bringing their corruptions and their maladies . . . ." Powers 59. The renowned Major John Wesley Powell, who was then in charge of the United States Geographical and Geological Survey of the Rocky Mountain Region, Department of the Interior, placed little faith in Powers' figures and requested that he modify his estimates. Powers expressed his displeasure at this in a letter to Major Powell stating, in characteristic fashion,

"I have the greatest respect for your views and beliefs, and, with your rich fund of personal experience and observation; if you desire to cut out the paragraph and insert one under your own signature, in brackets, or something of that kind, I will submit without a murmur, if you will add this remark, as quoted from myself, to wit: 'I desire simply to ask the reader to remember that Major Powell has been accustomed to the vast sterile wastes of the interior of the continent, and has not visited the rich forests and teeming rivers of California.' But I should greatly prefer that you would simply disavow the estimates, and throw the whole responsibility upon me.

"This permission I give you; but I have waded too many rivers and climbed too many mountains to abate one jot of my opinions or beliefs for any carpet-knight who yields a compiling-pen in the office of the —— or ——. If any critic, sitting in his comfortable parlor in New York, and reading about the sparse aboriginal populations of the cold forests of the Atlantic States, can overthrow any of my conclusions with a dash of his pen, what is the use of the book at all? As Luther said, at the Diet of Worms, 'Here I stand; I cannot do otherwise.'

"I beg you, my dear major, not to consider anything above

The effect of the 1861 flood cannot be firmly established; but it is clear that the tribe remained on the Klamath thereafter.[8] For later years, Kroeber estimated that the population in 1895 was 900, and, in 1910, 668. Kroeber 19. From this it would appear that the flood at least did not cause a dissolution of the tribe; on the contrary, the Yuroks continued to reside in the area through the turn of the century and beyond.

The Act of April 8, 1864, 13 Stat. 39, designated California as one Indian superintendency. It also recited that "there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for the purposes of Indian reservations." It further provided that "the several Indian reservations in California which shall not be retained . . . under . . . this act, shall . . . be surveyed into lots or parcels . . . and . . . be offered for sale at public outcry, and thence afterward shall be held subject to sale at private entry." *Id.*, at 40.

At the time of the passage of the 1864 Act there were, apparently, three reservations in California: the Klamath River, the Mendocino, and the Smith River. It appears, also, that the President did not take immediate

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written as in the slightest degree disrespectful to yourself; such is the farthest remove from my thoughts." Powers 2–3.

Powers' estimates were not altered, and the above-quoted letter was placed sympathetically by Major Powell in the introductory section of Powers' published study.

[8] 1864 Report 122; Opinion dated Jan. 20, 1891, of the Assistant Attorney General for the Department of the Interior, quoted in *Crichton* v. *Shelton*, 33 I. D. 205, 210 (1904); Kroeber 19. Another source estimates that in 1871 the Indian population along the Klamath was 2,500. Report of D. H. Lowry, Indian Agent, Sept. 1, 1871, noted in *Short* v. *United States*, No. 102–63, p. 35 (Report of Commissioner, Court of Claims, 1972).

action, upon the passage of the Act, to recognize reservations in California. It was not until 1868 that any formal recognition occurred, and then it was the Congress, rather than the President, that acted. In that year Congress discontinued the Smith River Reservation, 15 Stat. 221, and restored the Mendocino to the public lands. *Id.*, at 223. No similar action was taken with respect to the Klamath River Reservation. *Crichton* v. *Shelton*, 33 I. D., at 209. Congress made appropriations for the Round Valley Reservation, 15 Stat. 221, and for it and the Hoopa Valley Reservation in 1869, 16 Stat. 37, although neither of these, apparently, had been established theretofore by formal Executive Order.[9]

The Klamath River Reservation, although not reestablished by Executive Order or specific congressional action, continued, certainly, in *de facto* existence. Yuroks remained on reservation land, and the Department of Indian Affairs regarded the Klamath River Reservation as "in a state of reservation" throughout the period from 1864 to 1891.[10] No steps were taken to sell the reservation, or parts thereof, under the 1864 Act. Indeed, in 1879, all trespassers there were removed by the military. In 1883 the Secretary of the Interior directed that allotments of land be made to the Indians on the reservation.[11] In February 1889, the Senate, by

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[9] The Hoopa Valley Reservation was located August 21, 1864, but formally set apart for Indian purposes, as authorized by the 1864 Act, by President Grant only by Executive Order dated June 23, 1876. Kappler 815. See Appendix map. The area is that described as the "Original Hoopa Valley Reservation."

[10] Letter dated Apr. 4, 1888, from the Commissioner of Indian Affairs to the Secretary of the Interior, quoted in *Crichton* v. *Shelton*, 33 I. D., at 211.

[11] The allotments, however, were postponed "on account of the discovery of gross errors in the public surveys." *Ibid.;* 1885 Report XLVIII.

resolution, directed the Secretary of the Interior "to inform the Senate what proceedings, if any, have been had in his Department relative to the survey and sale of the Klamath Indian reservation . . . in pursuance of the provisions of the act approved April 8, 1864." 20 Cong. Rec. 1818. In response, the Commissioner of Indian Affairs, by letter dated February 18, 1889, to the Secretary disclosed that no proceedings to this effect had been undertaken.[12] An Assistant Attorney General for the Department of the Interior expressed a similar view in an opinion dated January 20, 1891.[13]

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[12] "In response to said resolution, I have to state that I am unable to discover from the records or correspondence of this office that any proceedings were ever had or contemplated by this Department for the survey and sale of said reservation under the provisions of the act aforesaid; on the contrary, it appears to have been the declared purpose and intention of the superintendent of Indian affairs for California, who was charged with the selection of the four reservations to be retained under said act, either to extend the Hoopa Valley Reservation (one of the reservations selected under the act), so as to include the Klamath River Reservation, or else keep it as a separate independent reservation, with a station or subagency there, to be under control of the agent at the Hoopa Valley Reservation, and the lands have been held in a state of reservation from that day to this (Ex. Doc. 140, pp. 1, 2)." Quoted in *Crichton* v. *Shelton*, 33 I. D., at 212.

[13] "Pushing aside all technicalities of construction, can any one doubt that for all practical purposes the tract in question constitutes an Indian reservation? Surely, it has all the essential characteristics of such a reservation; was regularly established by the proper authority; has been for years and is so occupied by Indians now, and is regarded and treated as such reservation by the executive branch of the government, to which has been committed the management of Indian affairs and the administration of the public land system . . . . It is said, however, that the Klamath River reservation was abolished by section three of the act of 1864. Is this so?

. . . . . .

"In the present instance, the Indians have lived upon the described tract and made it their home from time immemorial; and

In 1888, in a forfeiture suit, the United States District Court for the Northern District of California concluded that the area within the Klamath River Reservation was not Indian country, within the meaning of Rev. Stat. § 2133, prescribing the penalty for unlicensed trading in Indian country. The court concluded that the land composing the reservation was not retained or recognized as reservation land pursuant to the 1864 Act and that, therefore, it no longer constituted an Indian reservation. *United States* v. *Forty-eight Pounds of Rising Star Tea,* 35 F. 403 (ND Cal. 1888). This holding was expressly affirmed on appeal to a circuit judge. 38 F. 400 (CCND Cal. 1889). The Assistant Attorney General, in the opinion referred to above, conceded the probable correctness of the judgment but was not convinced that his own views were erroneous, and he could not assent to the reasoning of the court. He felt that the court's comments as to the abandoned status of the reservation "were *dicta* and not essential to the decision of the case before the court." *Crichton* v. *Shelton,* 33 I. D., at 215.

Thus, as of 1891, it may be fair to say that the exact legal status of the Klamath River Reservation was obscure and uncertain. The petitioner in his brief here,

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it was regularly set apart as such by the constituted authorities, and dedicated to that purpose with all the solemnities known to the law, thus adding official sanction to a right of occupation already in existence. It seems to me something more than a mere implication, arising from a rigid and technical construction of an act of Congress, is required to show that it was the intention of that body to deprive these Indians of their right of occupancy of said lands, without consultation with them or their assent. And an implication to that effect is all, I think that can be made out of that portion of the third section of the act of 1864 which is supposed to be applicable." Quoted in *Crichton* v. *Shelton,* 33 I. D., at 212–213.

p. 14, states that the reservation "ceased to exist in 1876, at the latest."

Any question concerning the reservation's continuing legal existence, however, appears to have been effectively laid to rest by an Executive Order dated October 16, 1891, issued by President Benjamin Harrison.[14] By the specific terms of that order, the Hoopa Valley Reservation, which, as we already have noted, was located in 1864 and formally set apart in 1876, and which was situated about 50 miles upstream from the Klamath River's mouth, was extended so as to include all land, one mile in width on each side of the river, from "the present limits" of the Hoopa Valley Reservation to the Pacific Ocean. The Klamath River Reservation, or what had been the reservation, thus was made part of the Hoopa Valley Reservation, as extended.

The reason for incorporating the Klamath River Reservation in the Hoopa Valley Reservation is apparent. The 1864 Act had authorized the President to "set apart" no more than four tracts for Indian reservations in California. By 1876, and certainly by 1891, four reservations already had been so set apart. These were the Round Valley, referred to above, the Mission,[15] the Hoopa

[14] "It is hereby ordered that the limits of the Hoopa Valley Reservation in the state of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in said State, by Act of Congress approved April [8], 1864, (13 Stats., 39), be and the same are hereby extended so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Valley reservation to the Pacific Ocean; *Provided, however,* That any tract or tracts included within the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended." Kappler 815.

[15] Kappler 819–824. It is noteworthy that the boundaries of the Mission Reservation were altered repeatedly between 1870 and 1875,

Valley, and the Tule River. Kappler 830–831. Thus, recognition of a fifth reservation along the Klamath River was not permissible under the 1864 Act. Accordingly, the President turned to his authority under the Act to expand an existing, recognized reservation. He enlarged the Hoopa Valley Reservation to include what had been the Klamath River Reservation as well as an intervening riparian strip connecting the two tracts.[16] The President's continuing authority so to enlarge reservations and, specifically, the legality of the 1891 Executive Order, was affirmed by this Court in *Donnelly* v. *United States,* 228 U. S. 243, 255–259 (1913), reh. denied, 228 U. S. 708, and is not challenged here.

II

This general background as to the origin and development of the Klamath River Reservation is not contested by either party. The reservation's existence, pursuant to the Executive Order of 1891, is conceded. The present controversy relates to its termination subsequent to 1891, and turns primarily upon the effect of the Act of June 17, 1892, 27 Stat. 52, entitled "An act to provide for the

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and even thereafter. These actions were taken under the President's continuing authority to set apart and add to or diminish the four reservations authorized under the 1864 Act. *Donnelly* v. *United States,* 228 U. S. 243 and 708 (1913). In its final form, the Mission Reservation consisted of no less than 19 different and noncontiguous tracts. Kappler 819–824; *Crichton* v. *Shelton,* 33 I. D., at 209–210.

[16] See Appendix map. The strip of land between the Hoopa Valley Reservation and the Klamath River Reservation is referred to there as the "Connecting Strip." Under the 1891 Executive Order the Hoopa Valley Reservation was extended to encompass all three areas indicated on the map. The connecting strip and the old Klamath River Reservation frequently are referred to as the Hoopa Valley Extension.

disposition and sale of lands known as the Klamath River Indian Reservation." This Act provided:

> "That all of the lands embraced in what was Klamath River Reservation in the State of California, as set apart and reserved under authority of law by an Executive order dated November sixteenth, eighteen hundred and fifty-five, are hereby declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands: *Provided,* That any Indian now located upon said reservation may, at any time within one year from the passage of this act, apply to the Secretary of the Interior for an allotment . . . . And the Secretary of the Interior may reserve from settlement, entry, or purchase any tract or tracts of land upon which any village or settlement of Indians is now located, and may set apart the same for the permanent use and occupation of said village or settlement of Indians. . . . *Provided further,* That the proceeds arising from the sale of said lands shall constitute a fund to be used under the direction of the Secretary of the Interior for the maintenance and education of the Indians now residing on said lands and their children."

The respondent Director argues that this statute effected the termination of the Klamath River Reservation. The petitioner urges the contrary. It is our task, in light of the language and purpose of the Act, as well as of the historical background, outlined above, to determine the proper meaning of the Act and, consequently, the current status of the reservation.

The respondent relies upon what he feels is significant language in the Act and upon references in the legislative history. He contends, "The fact that the lands were to be opened up for settlement and sale by homesteaders strongly militates against a continuation of such reservation status." Brief for Respondent 3.

We conclude, however, that this is a misreading of the effect of the allotment provisions in the 1892 Act. The meaning of those terms is to be ascertained from the overview of the earlier General Allotment Act of 1887, 24 Stat. 388. That Act permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished.[17] Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways. See § 6 of the General Allotment Act, 24 Stat. 390; United States Department of the Interior, Federal Indian Law 115–117, 127–129, 776–777 (1958).[18]

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[17] The trust period on allotments to Indians on the Klamath River Reservation expired in 1919, but was later extended by Congress by the Act of Dec. 24, 1942, 56 Stat. 1081, 25 U. S. C. § 348a. See S. Rep. No. 1714, 77th Cong., 2d Sess. (1942). And in 1958 Congress restored to tribal ownership vacant and undisposed-of ceded lands on various reservations, including 159.57 acres on the Klamath River Reservation. Pub. L. 85–420, 72 Stat. 121.

[18] For an extended treatment of allotment policy, see D. Otis, History of the Allotment Policy, in Readjustment of Indian Affairs, Hearings on H. R. 7902 Before the House Committee on Indian Affairs, 73d Cong., 2d Sess., 428–440 (1934). The policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984, now amended and codified as 25 U. S. C. § 461 *et seq.*

Under the 1887 Act, however, the President was not required to open reservation land for allotment; he merely had the discretion to do so.

In view of the discretionary nature of this presidential power, Congress occasionally enacted special legislation in order to assure that a particular reservation was in fact opened to allotment.[19] The 1892 Act was but one example of this. Its allotment provisions, which do not differ materially from those of the General Allotment Act of 1887, and which in fact refer to the earlier Act, do not, alone, recite or even suggest that Congress intended thereby to terminate the Klamath River Reservation. See *Seymour* v. *Superintendent,* 368 U. S. 351, 357–358 (1962). Rather, allotment under the 1892 Act is completely consistent with continued reservation status. This Court unanimously observed, in an analogous setting in *Seymour, id.,* at 356, "The Act did no more [in this respect] than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." See *United States* v. *Celestine,* 215 U. S. 278 (1909); *United States* v. *Nice,* 241 U. S. 591 (1916). See also *Wilbur* v. *United States,* 281 U. S. 206 (1930); *Donnelly* v. *United States,* 228 U. S. 243 (1913).

III

The respondent further urges, however, that his view of the effect of the 1892 Act is supported by the Act's ref-

[19] See, for example, the Act of Mar. 2, 1889, 25 Stat. 888 (Sioux Reservations), and *United States* v. *Nice,* 241 U. S. 591 (1916); the Act of Mar. 22, 1906, 34 Stat. 80 (Colville Reservation), and *Seymour* v. *Superintendent,* 368 U. S. 351 (1962); the Act of May 29, 1908, 35 Stat. 460 (Cheyenne River and Standing Rock Reservations), and *United States ex rel. Condon* v. *Erickson,* 478 F. 2d 684 (CA8 1973), aff'g 344 F. Supp. 777 (SD 1972).

erence to "what was [the] Klamath River Reservation." According to the respondent, this reference, and other references in the legislative history, compel the conclusion that Congress intended to terminate the reservation in 1892.

The 1892 Act, to be sure, does refer to the Klamath River Reservation in the past tense. But this is not to be read as a clear indication of congressional purpose to terminate. Just a few weeks before the bill (H. R. 38, 52d Cong., 1st Sess.), which eventually became the Act, was reported out of committee on February 5, 1892, H. R. Rep. No. 161, 52d Cong., 1st Sess., the President had formally extended the Hoopa Valley Reservation to include the Klamath River Reservation. And only that portion of the extension which had been the Klamath River Reservation was the subject of the 1892 Act. The reference to the Klamath River Reservation in the past tense seems, then, merely to have been a natural, convenient, and shorthand way of identifying the land subject to allotment under the 1892 Act.[20] We do not believe

[20] The respondent argues, however, that Congress, perhaps unacquainted with the Executive Order of October 1891, intended this language to convey the view expressed in the House Report, H. R. Rep. No. 161, *supra*, 23 Cong. Rec. 1598–1599 (1892), that the Klamath River Reservation had long been abandoned and, in fact and in law, had already been terminated.

It is clear from the text, *infra*, that there were efforts in certain quarters of the House to terminate the reservation and open it for white settlement. See *Short* v. *United States*, *supra*, n. 8, at 34–52. While the respondent's interpretation of the phrase is plausible, it is no less plausible to conclude, in light of the repeated and unsuccessful efforts by the House to terminate the reservation, that the Senate proponents of the legislation were not inclined to make their cause (of requiring allotments) less attractive to the House by amending the bill to refer to the "former Klamath River Reservation, now part of the Hoopa Valley Reservation" rather than "what was [the] Klamath River Reservation."

the reference can be read as indicating any clear purpose to terminate the reservation directly or by innuendo.

The respondent also points to numerous statements in the legislative history that, in his view, indicate that the reservation was to be terminated. We need not refer in detail to the cited passages in H. R. Rep. No. 161, *supra*, or to the debates on the bill, 23 Cong. Rec. 1598–1599, 3918–3919 (1892), for there is no challenge here to the view that the House was generally hostile to continued reservation status of the land in question. In our estimation, however, this very fact, in proper perspective, supports the petitioner and undermines the respondent's position.

As early as 1879, there were efforts in Congress to abolish the Klamath River Reservation. From that date to 1892 strong sentiment existed to this effect. But it does not appear that termination ever commanded majority support. The advocates of termination argued that the reservation, as of 1879, long had been abandoned; that the land was useless as a reservation; and that many white settlers had moved on to the land and their property should be protected. See H. R. Rep. No. 1354, 46th Cong., 2d Sess., 5 (1880). That whites had settled there is clear, but the view that no Indians remained after the flood of 1861 appears to have been a gross misconception on the part of those who sought termination.[21]

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[21] The Department of the Interior took issue with the Committee's population estimates. H. R. Rep. No. 1148, 47th Cong., 1st Sess., 1–3 (1882). In a letter transmitted to the Committee on Indian Affairs in 1881, an infantry lieutenant, acting as Indian Agent, suggested that the Committee's population estimates were "gleaned principally from civilians, who are, I believe, somewhat inclined to lessen the number, thinking doubtlessly that the smaller the number the greater the likelihood of its being thrown open to settlers." *Id.*, at 2.

The first bill providing for public entry and sale of the Klamath River Reservation was introduced in the Senate on May 28, 1879. S. Res. 34, 46th Cong., 1st Sess.; 9 Cong. Rec. 1651. The resolution referred to the reservation's having been "abandoned" in 1855 " and the tribe removed to another reservation established for its use." No action was taken on the bill, and another, of the same purport, was introduced on January 12, 1880, in the House. H. R. 3454, 46th Cong., 2d Sess.; 10 Cong. Rec. 286. This bill provided that the reservation "be, and the same is hereby, abolished," and authorized and directed the Secretary of the Interior to survey the lands and have them made subject to homestead and preemption entry and sale "the same as other public lands." It is clear from the report on this second bill, H. R. Rep. No. 1354, *supra,* at 1–5, that the establishment of the reservation in 1855 was viewed as a mistake and an injustice. According to the Report, the reservation had been abandoned after the 1861 freshet, and the Indians had moved to the Smith River and, later, the Hoopa Valley Reservations. White settlers had moved in and wished to exploit the lumber and soil of the area which, some said, "has no equal in California as a fruit and wine growing country." *Id.,* at 5. Inasmuch as the reservation blocked access to the river, the resources of the area could not be developed. Although unmentioned in that Report, the Office of Indian Affairs opposed the bill. See H. R. Rep. No. 1148, 47th Cong., 1st Sess., 1 (1882). The bill as reported was recommitted and no further action was taken. 10 Cong. Rec. 3126 (1880).

An identical bill was introduced in the following Congress. H. R. 60, 47th Cong., 1st Sess.; 13 Cong. Rec. 90 (1881). The Commissioner of Indian Affairs opposed the bill as introduced, but stated that he would not oppose it if provision for prior allotments to the Indians was made. H. R. Rep. No. 1148, *supra,* at 2. The

Commissioner's proposed amendment was approved by the Committee, 13 Cong. Rec. 3414 (1882), but no action on the bill was taken by the full House.

In 1883 and 1884 three more bills were introduced. It is of interest to note that each acceded to the request of the Commissioner that provision be made for prior allotments to resident Indians. H. R. 112, 48th Cong., 1st Sess.; 15 Cong. Rec. 62 (1883); S. 813, 48th Cong., 1st Sess.; 15 Cong. Rec. 166 (1883); H. R. 7505, 48th Cong., 1st Sess.; 15 Cong. Rec. 5923 (1884). Each bill would have "abolished" the reservation and would have made the land subject to homestead and pre-emption entry. None of the bills was enacted, although passage must have been generally regarded as likely, for the Indian Bureau in 1883 began the work of allotment and survey, perhaps in anticipation of passage.

In 1885 two bills were introduced in the House. Each was substantially identical to those introduced in 1883 and 1884. H. R. 158 and H. R. 165, 49th Cong., 1st Sess.; 17 Cong. Rec. 370 (1885). No action was taken on either bill.

No further bills, apparently, were introduced until 1889. During the intervening period, however, the General Allotment Act of 1887, 24 Stat. 388, was passed and thereafter amended, 26 Stat. 794. The *Rising Star Tea* case, 35 F. 403, was also decided.

In 1889 a bill providing for the allotment of the Klamath River Reservation was introduced. The allotments, however, were to be made in a manner inconsistent with the General Allotment Act. H. R. 12104, 50th Cong., 2d Sess.; 20 Cong. Rec. 756 (1889). And after affirmance of the *Rising Star Tea* case by the circuit court, 38 F. 400 (1889), identical bills were introduced in the House and the Senate providing, without mention of allotment, that "all of the lands embraced in what was Klamath River Reservation . . . are hereby de-

cleared to be subject to settlement, entry, and purchase" under the land laws. H. R. 113, 51st Cong., 1st Sess.; 21 Cong. Rec. 229 (1889); S. 2297, 51st Cong., 1st Sess.; 21 Cong. Rec. 855 (1890). The Indian Office opposed the bills, recommending that they be amended to provide for allotments to the Indians under the General Allotment Act, that surplus lands be restored to the public domain, and that the proceeds be held in trust for the Klamath River Indians. See *Short* v. *United* States, No. 102–63, pp. 44–45 (Report of Commissioner, Court of Claims, 1972). H. R. 113 was reported out of committee with certain amendments, including one to the effect that proceeds arising from the sale of lands were to be used for the "removal, maintenance, and education" of the resident Indians, the Hoopa Valley Reservation being considered the place of removal. Allotments to the Indians on the Klamath Reservation, however, were emphatically rejected. H. R. Rep. No. 1176, 51st Cong., 1st Sess., 2 (1890). The bill was so amended and passed the House. 21 Cong. Rec. 10701–10702 (1890). It died in the Senate.

In light of the passage of this last bill in the House and the presence of the *Rising Star Tea* opinions, the Indian Department moved to have the Klamath River Reservation land protected for the Indians residing there. The details of this effort, including the opinion of the Assistant Attorney General, referred to above, are outlined in the Commissioner's report in *Short* v. *United States, supra,* at 45–50. These efforts culminated in President Harrison's Executive Order of October 1891 expanding the Hoopa Valley Reservation to include the Klamath River Reservation.

It is against this background of repeated legislative efforts to terminate the reservation, and to avoid allotting reservation lands to the Indians, that the 1892 Act was introduced. H. R. 38, 52d Cong., 1st Sess.; 23 Cong.

Rec. 125 (1892). The bill provided for the settlement, entry, and purchase of the reservation land and specified that the proceeds should be used for the "removal, maintenance, and education" of the resident Indians. No allotments were provided for, as the Indians were "semicivilized, disinclined to labor, and have no conception of land values or desire to cultivate the soil." H. R. Rep. No. 161, 52d Cong., 1st Sess., 1 (1892). The House Committee on Indian Affairs amended the bill by changing the word "and" to "or" in the proviso relating to the use of proceeds. *Id.*, at 2.

The bill passed the House without change. 23 Cong. Rec. 1598–1599 (1892). It was struck out in the Senate, however, and another version was substituted deleting reference to the removal of the Indians and providing that before public sale the land should be allotted to the Indians under the General Allotment Act of 1887, as amended. *Id.*, at 3918–3919. This substitute measure had the support of the Interior Department. *Id.*, at 3918. The Senate called for a conference with the House, *id.*, at 3919, and the conference adopted the Senate version with amendments. Sen. Misc. Doc. No. 153, 52d Cong., 1st Sess. (1892). The bill was then passed and became the 1892 Act.

IV

Several conclusions may be drawn from this account. First, the respondent's reliance on the House Report and on comments made on the floor of the House is not well placed. Although the primary impetus for termination of the Klamath River Reservation had been with the House since 1871, this effort consistently had failed to accomplish the very objectives the respondent now seeks to achieve. Likewise, the House in 1892 failed to accomplish these objectives, for the Senate version, supported by the Interior Department, was substituted for that of

the House. The Senate version, ultimately enacted, provided for allotments to the Indians and for the proceeds of sales to be held in trust for the "maintenance and education," not the removal, of the Indians. The legislative history relied upon by the respondent does not support the view that the reservation was terminated; rather, by contrast with the bill as finally enacted, it compels the conclusion that efforts to terminate the reservation by denying allotments to the Indians failed completely.

A second conclusion is also inescapable. The presence of allotment provisions in the 1892 Act cannot be interpreted to mean that the reservation was to be terminated. This is apparent from the very language of 18 U. S. C. § 1151, defining Indian country "notwithstanding the issuance of any patent" therein. More significantly, throughout the period from 1871–1892 numerous bills were introduced which *expressly* provided for the termination of the reservation and did so in unequivocal terms. Congress was fully aware of the means by which termination could be effected. But clear termination language was not employed in the 1892 Act. This being so, we are not inclined to infer an intent to terminate the reservation.[22] The Court stated in *United States* v. *Celestine,* 215 U. S., at 285, that "when Congress has

[22] Congress has used clear language of express termination when that result is desired. See, for example, 15 Stat. 221 (1868) ("the Smith River reservation is hereby discontinued"); 27 Stat. 63 (1892) (adopted just two weeks after the 1892 Act with which this case is concerned, providing that the North Half of the Colville Indian Reservation, "the same being a portion of the Colville Indian Reservation . . . be, and is hereby, vacated and restored to the public domain"), and *Seymour* v. *Superintendent,* 368 U. S., at 354; 33 Stat. 218 (1904) ("the reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby, abolished").

once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history. See *Seymour* v. *Superintendent*, 368 U. S. 351 (1962); *United States* v. *Nice*, 241 U. S. 591 (1916).[23]

Finally, our conclusion that the 1892 Act did not terminate the Klamath River Reservation is reinforced by repeated recognition of the reservation status of the land after 1892 by the Department of the Interior and by Congress. In 1904 the Department, in *Crichton* v. *Shelton*, 33 I. D. 205, ruled that the 1892 Act reconfirmed the continued existence of the reservation. In 1932 the Department continued to recognize the Klamath River Reservation, albeit as part of the Hoopa Valley Reservation,[24] and it continues to do so today. And Congress has recognized the reservation's continued existence by extending the period of trust allotments for this very reservation by the 1942 Act, described above, 25 U. S. C. § 348a, and by restoring to tribal ownership certain vacant and undisposed-of ceded lands in the reservation by the 1958 Act, *supra*.[25]

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[23] In *United States ex rel. Condon* v. *Erickson*, 478 F. 2d 684 (1973), the United States Court of Appeals for the Eighth Circuit reached a similar conclusion in a case presenting issues not unlike those before us. The court concluded, *id.*, at 689, that "a holding favoring federal jurisdiction is required unless Congress has *expressly or by clear implication* diminished the boundaries of the reservation opened to settlement" (emphasis in original).

[24] Hearings before a Subcommittee of the Senate Committee on Indian Affairs, Survey of Conditions of the Indians in the United States, pt. 29, California, 72d Cong., 1st Sess., 15532 (1934).

[25] Although subsequent legislation usually is not entitled to much weight in construing earlier statutes, *United States* v. *Southwestern Cable Co.*, 392 U. S. 157, 170 (1968), it is not always without significance. See *Seymour* v. *Superintendent*, 368 U. S., at 356–357.

We conclude that the Klamath River Reservation was not terminated by the Act of June 17, 1892, and that the land within the boundaries of the reservation is still Indian country, within the meaning of 18 U. S. C. § 1151.

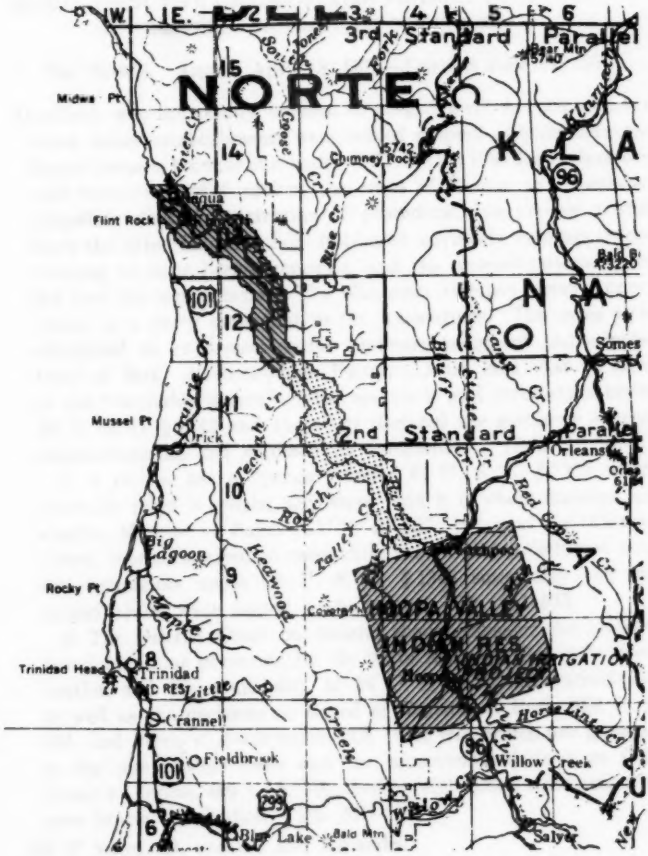
The judgment of the Court of Appeal is reversed, and the case is remanded for further proceedings.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

MAP OF HOOPA VALLEY INDIAN RESERVATION, CALIFORNIA*

Scale: 1 inch = 12 miles



LEGEND:

- Old Klamath River Reservation.
- Connecting Strip.
- Original Hoopa Valley Reservation.

*United States Department of Interior, General Land Office 1944.

Syllabus

CITY OF KENOSHA ET AL. *v.* BRUNO ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

No. 72–658. Argued April 18, 1973—Decided June 11, 1973

Appellees, who apparently because of alleged nude dancing at their retail liquor establishments were denied renewal of their one-year liquor licenses, brought suit under 42 U. S. C. § 1983 for declaratory and injunctive relief against the cities of Racine and Kenosha. Appellees claimed deprivation of procedural due process arising from the cities' failure to hold full-blown adversary hearings before refusing to issue license renewals, and the unconstitutionality of the local licensing scheme. The Wisconsin Attorney General intervened as a party defendant in the proceedings. The cases were submitted on cross-motions for summary judgment and stipulations of fact. A three-judge District Court held that in light of the "equitable nature" of the actions it had jurisdiction under 28 U. S. C. § 1343 and the court declared the statutory scheme unconstitutional and enjoined its enforcement. *Held:*

1. A city is not a "person" under 42 U. S. C. § 1983 where equitable relief is sought, any more than it is where damages are sought, *Monroe* v. *Pape*, 365 U. S. 167, 187, and the District Court, therefore, erred in concluding that it had jurisdiction over the complaints under 28 U. S. C. § 1343 since only the two municipalities were named as defendants. Pp. 511–513.

2. The District Court on remand should consider the jurisdictional questions presented by the State Attorney General's intervention and the availability of 28 U. S. C. § 1331 jurisdiction, as well as the decisions in *Board of Regents* v. *Roth*, 408 U. S. 564, and *Perry* v. *Sindermann*, 408 U. S. 593, which are germane to the due process issue, and the supervening decision in *California* v. *LaRue*, 409 U. S. 109, dealing with broad state authority over liquor distribution. Pp. 513–515.

346 F. Supp. 43, vacated and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. BRENNAN, J., filed a concurring opinion, in which MARSHALL, J., joined, *post*, p. 516. DOUGLAS, J., filed an opinion dissenting in part, *post*, p. 516.

LeRoy L. Dalton, Assistant Attorney General of Wisconsin, argued the cause for appellants. With him on the briefs were *Robert W. Warren,* Attorney General, *Michael S. Fisher,* and *Edward A. Krenzke.*

James A. Walrath argued the cause and filed a brief for appellees Sleepy's, Inc., et al.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellees, owners of retail liquor establishments, were holders of tavern liquor licenses [1] issued under Wisconsin law by appellants, the cities of Racine and Kenosha. Acting pursuant to Wis. Stat. Ann. §§ 176.05 (1), (8) (1957 and Supp. 1973), the cities denied appellees' applications for renewal of their one-year licenses after holding public "legislative" hearings. Alleging, *inter alia,* deprivations of their Fourteenth Amendment procedural due process rights in such denials and, by amended complaints, the unconstitutionality of §§ 176.05 (1), (8), appellees brought these federal civil rights actions for declaratory and injunctive relief naming in each case only the appropriate municipality as a defendant. The District Court entered temporary restraining orders commanding the immediate issuance of licenses and convened a three-judge district court pursuant to 28 U. S. C. § 2281 to rule on the constitutionality of the statutory licensing procedure. Thereafter, the Attorney General of Wisconsin was allowed to intervene as a party defendant on his own motion. On cross-motions for summary judgment, the

[1] In the case of appellee Misurelli, it appears from the record that his partner was actually the holder of the expired license. The District Court held, however, that in substance his application was no different from those of the other appellees.

District Court declared the statute unconstitutional and enjoined its enforcement. This direct appeal followed.

Under the Wisconsin local licensing scheme, the governing bodies of municipalities are authorized to grant liquor licenses "to such persons entitled to a license under this chapter as they deem proper to keep places within their respective towns, villages, or cities for the sale of intoxicating liquors. . . ." Wis. Stat. Ann. § 176.05 (1) (1957).[2] The statutory scheme has been interpreted by the Wisconsin Supreme Court to require a "legislative type of hearing wherein one is given notice of the hearing and a fair opportunity to state his position on the issue," in situations where municipalities have denied an application for renewal of a license. *Ruffalo* v. *Common Council,* 38 Wis. 2d 518, 524, 157 N. W. 2d 568, 571 (1968). Such applications may not be rejected "without a statement on the clerk's minutes as to the reasons for such rejection," Wis. Stat. Ann. § 176.05 (8) (Supp. 1973),[3] and the state courts have certiorari jurisdiction to

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[2] Wis. Stat. Ann. § 176.05 provides:

"(1) Authority to grant licenses. Each town board, village board and common council may grant retail licenses, under the conditions and restrictions in this chapter contained, to such persons entitled to a license under this chapter as they deem proper to keep places within their respective towns, villages, or cities for the sale of intoxicating liquors. No member of any such town board, village board or common council shall sell directly or indirectly or offer for sale, to any person, firm, or corporation that holds or applies for any such license any bond, material, product, or other matter or thing that may be used by any such licensee or prospective licensee in the carrying on of his or its said business."

[3] Wis. Stat. Ann. § 176.05 provides:

"(8) Annual license meetings. All town and village boards and common councils, or the duly authorized committees of such councils, shall meet not later than May 15 of each year and be in session from day to day thereafter, so long as it may be necessary, for the purpose of acting upon such applications for license as may be

review whether such refusals by the councils are arbitrary, capricious, or discriminatory. *Ruffalo* v. *Common Council, supra.*

In the case of the Racine denials,[4] it was stipulated that the question of the appellees' applications for licenses was referred to the License and Welfare Committee of the Common Council and that at public hearings conducted by that Committee, appellees were present and heard oral objections to the renewal of the licenses for their taverns.[5] After holding a public hearing, the Common Council followed the Committee's recommendation and voted to deny the applications, apparently because of the adverse effects on the community of nude dancing in the bars.

It was also stipulated that at all meetings, all persons including appellees were given an opportunity to speak, but no speaker was sworn. None of the testimony was recorded and no verbatim transcript was made. Appellees were not advised that they could cross-examine any of the speakers, and they did not request

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presented to them on or before April 15, and all applications for license so filed shall be granted, issued or denied not later than June 15 for the ensuing license year, provided that nothing shall prevent any governing body from granting any licenses which are applied for at any other time. As soon as an application has been approved, a duplicate copy thereof shall be forwarded to the secretary of revenue. No application for a license which is in existence at the time of such annual license meeting shall be rejected without a statement on the clerk's minutes as to the reasons for such rejection."

[4] The Racine denials were utilized by the District Court as the basis for the main opinion holding the Wisconsin scheme unconstitutional and the other cases were decided on the basis of the main opinion. We are therefore primarily considering the factual background of the Racine denials in our disposition.

[5] No such stipulation was filed for appellee Robers, however.

such an opportunity. And there was no advance written specification of the charges against any of the bars.

Relying on two Seventh Circuit decisions,[6] the three-judge court (as had the single judge) held that "in light of the equitable nature of this action" it had jurisdiction pursuant to 28 U. S. C. § 1343 (3).[7] Concluding that Racine's interest in being able to deny the renewal of liquor licenses with no other safeguard than a legislative hearing is "minimal," the court balanced that interest against that of appellees, assertedly their occupations and their investments, and determined that the Due Process Clause of the Fourteenth Amendment requires municipalities to grant an "adversary-type hearing in which the applicant is given timely notice of the reasons urged for denial [of renewal of his license] and an opportunity to present, confront, and cross-examine witnesses under oath with a verbatim transcript." 346 F. Supp. 43, 51.

I

Neither party to the appeal has questioned the jurisdiction of the District Court, but "it is the duty of this court to see to it that the jurisdiction of the [district court], which is defined and limited by statute, is not exceeded." *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149, 152 (1908). Appellees alleged that they brought

[6] *Schnell* v. *City of Chicago*, 407 F. 2d 1084 (1969), and *Adams* v. *City of Park Ridge*, 293 F. 2d 585 (1961).

[7] Title 28 U. S. C. § 1343 provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . . . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . ."

their action under 42 U. S. C. § 1983,[8] and that the District Court therefore had jurisdiction under 28 U. S. C. § 1343. The District Court agreed. The only defendants named in the complaints, however, were the municipalities of Kenosha and Racine. In considering the reach of § 1983 in *Monroe* v. *Pape*, 365 U. S. 167 (1961), this Court examined the legislative history surrounding its enactment and said:

> "The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them." *Id.*, at 191.

The District Court relied on *Schnell* v. *City of Chicago*, 407 F. 2d 1084 (CA7 1969), and *Adams* v. *City of Park Ridge*, 293 F. 2d 585 (CA7 1961), in holding that *Monroe* was limited to actions for damages, and that cities were proper defendants under § 1983 where equitable relief was sought. *Adams*, *supra*,[9] in turn, relied on this Court's *per curiam* opinion in *Holmes* v. *City of Atlanta*, 350 U. S. 879 (1955). But in none of the three opinions in *Holmes* was the issue of whether or not a municipality is a "person" within the meaning of § 1983 discussed. The authority of that case as support for

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[8] Title 42 U. S. C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[9] The court in *Schnell* v. *City of Chicago*, *supra*, simply followed the previous circuit decision in *Adams* v. *City of Park Ridge*, *supra*, with no independent analysis.

the proposition that a city is a "person" under § 1983 where equitable relief is sought, but is not a "person" under the same section where damages are prayed for, is at least seriously weakened by the following observation in *Monroe, supra,* at 191 n. 50:

> "In a few cases in which equitable relief has been sought, a municipality has been named, along with city officials, as defendant where violations of 42 U. S. C. § 1983 were alleged. See, *e. g., Douglas* v. *City of Jeannette,* 319 U. S. 157; *Holmes* v. *City of Atlanta,* 350 U. S. 879. The question dealt with in our opinion was not raised in those cases, either by the parties or by the Court. Since we hold that a municipal corporation is not a 'person' within the meaning of § 1983, no inference to the contrary can any longer be drawn from those cases."

We find nothing in the legislative history discussed in *Monroe,* or in the language actually used by Congress, to suggest that the generic word "person" in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them. Since, as the Court held in *Monroe,* "Congress did not undertake to bring municipal corporations within the ambit of" § 1983, *id.,* at 187, they are outside of its ambit for purposes of equitable relief as well as for damages. The District Court was therefore wrong in concluding that it had jurisdiction of appellees' complaints under § 1343.

As previously noted, after the complaints had been filed and issue joined, the Attorney General of Wisconsin was allowed to intervene as a party defendant in the actions. The District Court, having concluded that it had jurisdiction to entertain the original complaints under § 1343, understandably did not address itself to the question of

whether the intervention of the Attorney General as a party would cure the jurisdictional defect which we now find to exist in appellees' complaints. The District Court also observed that "were not civil rights jurisdiction proper, each of the plaintiffs herein would be able to assert the necessary . . . controversy requirement of Title 28 U. S. C. § 1331." 346 F. Supp., at 50. But although appellees in the Racine denials alleged jurisdiction pursuant to 28 U. S. C. § 1331 as well as § 1343, and in each complaint there was an allegation of an investment in a tavern of at least $20,000, the defendant municipal corporations answered by putting the appellees to their proof as to the amount in controversy. Since the cases were submitted and decided on cross-motions for summary judgment and stipulations of fact, and no stipulation as to the amount in controversy was filed, we cannot say on this state of the record whether or not jurisdiction over the complaints was affirmatively established. See *Hague* v. *CIO,* 307 U. S. 496, 507–508 (1939), and cases therein cited. With respect to the Kenosha denials, there was a stipulation as to jurisdictional amount in the proceedings before the single-judge District Court, and an allegation of the requisite jurisdictional amount in the amended complaint, which for the first time challenged the constitutional validity of the Wisconsin statutory licensing scheme. No answer was filed to the amended complaint prior to the entry of judgment by the District Court.

We have had the benefit of neither briefs, arguments, nor explicit consideration by the District Court of the jurisdictional questions presented by the intervention of the Attorney General as a party, and the availability of § 1331 jurisdiction in view of the state of the record below. We therefore remand the case to the District Court for consideration of these issues.

II

Appellees' licenses have been neither revoked nor suspended. Their claim of deprivation of Fourteenth Amendment procedural due process rights arises from the failure of the cities of Kenosha and Racine to hold full-blown adversary hearings before refusing to renew their one-year licenses. Our decisions last year in *Board of Regents* v. *Roth,* 408 U. S. 564 (1972), and *Perry* v. *Sindermann,* 408 U. S. 593 (1972), discussed the nature of "liberty" and "property" that is protected against denial without due process by the Fourteenth Amendment. The District Court did not discuss these recent cases, and it followed, in part, the decision of the Court of Appeals for the Seventh Circuit which was reversed in *Roth.* It, therefore, made no evaluation of "property" or "liberty" interests which might require a due process hearing, or of the nature of such a hearing if it were required in the light of our opinions in *Roth, supra,* and *Perry, supra.*

The District Court, also, did not have the benefit of this Court's decision in *California* v. *LaRue,* 409 U. S. 109 (1972). There we held again that while the Twenty-first Amendment did not abrogate a requirement of procedural due process, *Wisconsin* v. *Constantineau,* 400 U. S. 433 (1971), it did grant the States broad authority over the distribution and sale of liquor. We also held that regulations prohibiting the sale of liquor by the drink on premises where there were nude but not necessarily obscene performances were facially constitutional.

We, therefore, direct the District Court, after addressing the issue of jurisdiction, to reconsider its judgment in the light of *Roth, Perry,* and *LaRue.* The judgment of the District Court is vacated and the cause is remanded for proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring.

Although I join the opinion of the Court, I would add that I find unimpeachably correct the District Court's conclusion that appellants failed to comply with the requirements of the Due Process Clause in denying renewal of appellees' liquor licenses. Nevertheless, since the defendants named in the complaints were the municipalities of Kenosha and Racine, jurisdiction cannot be based on 28 U. S. C. § 1343. *Moor* v. *County of Alameda*, 411 U. S. 693 (1973); *Monroe* v. *Pape*, 365 U. S. 167 (1961). Appellees did assert 28 U. S. C. § 1331 as an alternative ground of jurisdiction, but I agree with the Court's conclusion that existence of the requisite amount in controversy is not, on this record, clearly established. If appellees can prove their allegation that at least $10,000 is in controversy, then § 1331 jurisdiction is available, *Bell* v. *Hood*, 327 U. S. 678 (1946); cf. *Bivens* v. *Six Fed. Narcotics Agents*, 403 U. S. 388 (1971), and they are clearly entitled to relief.

MR. JUSTICE DOUGLAS, dissenting in part.

I have expressed my doubts in *Moor* v. *County of Alameda*, 411 U. S. 693, 722 (dissenting opinion), that our decision in *Monroe* v. *Pape*, 365 U. S. 167, bars equitable relief against a municipality. In that case the legislative history* on which that construction of "person" as used in 42 U. S. C. § 1983 was based related to the fear of mulcting municipalities with damage awards for unauthorized acts of its police officers. *Monroe* v. *Pape* may be read as containing *dicta* that a remedy by way of declaratory relief or by injunction is barred by § 1983 as well as suits for damages. Yet I do not think we should decide that question without full briefing and considered argument.

*See the Appendix to this opinion.

I do, however, concur in a remand for reconsideration by the District Court in light of *Board of Regents* v. *Roth*, 408 U. S. 564, *Perry* v. *Sindermann*, 408 U. S. 593, and *California* v. *LaRue*, 409 U. S. 109.

APPENDIX TO OPINION OF MR. JUSTICE DOUGLAS, DISSENTING IN PART

The holding in *Monroe* v. *Pape* that municipalities are not subject to suits for damages under § 1983 was based largely on Congress' rejection of the Sherman Amendment, which would have provided compensation for individuals from the county, city, or parish for any damage caused by riots, etc. Two theories were expressed in the debates for rejecting the amendment.

The first was the notion that civil liability for damages might destroy or paralyze local governments. Also, it was thought unjust that local governments (and indirectly the citizenry at large) should be subject to damages when they bore no responsibility. Although the Senate passed the amendment, Senator Stevenson stated in opposition:

> "This amendment wholly ignores the municipal liability created by the omission of direct, absolute corporate duty. We are now, for the first time, presented with an enactment which undertakes to create a corporate liability for personal injury which no prudence or foresight could have prevented. . . .
>
> "But, Mr. President, this amendment is clearly unconstitutional. If it is attempted to be carried out it will destroy the municipal government of every city and the local government of every county where this liability is created . . . . Let a judgment be recovered against any of our cities in the East or West and a lien is by this amendment created

> not only upon the municipal property of such city, but upon every dollar in the city treasury. The credit of the city, the means to discharge its contracts and its most solemn obligations are by the operation of this act to be applied to such judgment.
>
> "I have heard no reason for such a lien. If carried out to its full extent, it must prove utterly destructive of the State municipalities! And whence does the Federal Government derive its power in any manner or form to touch the revenues of the State governments or any of its agencies? . . ." Cong. Globe, 42d Cong., 1st Sess., 762.

Senators Casserly and Bayard expressed similar concerns. *Id.*, at 763–764, 776.

In the House, Congressman Kerr stated:

> "There is, therefore, a total and absolute absence of notice, constructive or implied, within any decent limits of law or reason. And the bill itself is significantly silent on the subject of notice to these counties and parishes or cities. Under this section it is not required, before liability shall attach, that it shall be known that there was any intention to commit these crimes, so as to fasten liability justly upon the municipality. . . . It takes the property of one and gives it to another by mere force, without right, in the absence of guilt or knowledge . . . ." *Id.*, at 788.

See also *id.*, at 791 (statement of Cong. Willard). And Congressman Farnsworth was concerned that the amendment would "put the hand of the national Government into [local government's] treasury." *Id.*, at 799.

There was another strain, however. Congressman Brooks viewed the amendment as raising the old struggle between the Federalists and the Democrats. *Id.*, at 790.

In the words of Congressman Poland, one of the House managers of the Conference Committee, "[w]ith these local subdivisions we have nothing to do. We can impose no duty upon them; we can impose no liability upon them in any manner whatever." *Id.*, at 793. He stated further:

> "But the enforcing a liability, existing by their own contract, or by a State law, in the courts, is a very widely different thing from devolving a new duty or liability upon them by the national Government, which has no power either to create or destroy them, and no power or control over them whatever. . . .
>
> ". . . Counties and towns are subdivisions of the State government, and exercise in a limited sphere and extent the powers of the State delegated to them; they are created by the State for the purpose of carrying out the laws and policy of the State, and are subject only to such duties and liabilities as State laws impose upon them." *Id.*, at 794.

After the House finally had defeated the Sherman Amendment and the Conference substitute for the amendment, Poland stated:

> "I did understand from the action and vote of the House that the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of State law." *Id.*, at 804.

See also *id.*, at 795 (statement of Cong. Burchard), 799 (statement of Cong. Farnsworth).

To the extent that the Sherman Amendment was directed only at liability for damages and the devastating effect those damages might have on municipalities, it

seems that the defeat of the amendment does not affect the existence *vel non* of an equitable action. One may, of course, argue that the sweeping statements of Poland and others that Congress had no constitutional power (however defective that argument is in light of developed constitutional doctrine) to authorize any action against a subdivision of state government indicated a purpose to go the whole way and not allow even injunctive relief against a municipality. But this is a matter which the Court has never faced.

Syllabus

LOGUE ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72-656. Argued April 24, 1973—Decided June 11, 1973

Petitioners, claiming that their son's suicide while he was confined as a federal prisoner in a county jail was proximately caused by the negligence of Government agents and employees, brought suit under the Federal Tort Claims Act, which establishes Government liability for negligent acts or omissions of an "employee of the Government," defined, *inter alia*, as a person officially "acting on behalf of a federal agency . . . with or without compensation." The Act excludes any contractor with the United States from the definition of federal agency. Though finding that the county had contracted with the Federal Government to house federal prisoners in its jail, the District Court held that the Government was liable on the grounds that the sheriff's employees negligently failed to maintain adequate surveillance of the decedent (who had attempted suicide while initially incarcerated) and that the Deputy United States Marshal negligently failed specifically to arrange for constant surveillance. The Court of Appeals reversed on the grounds that under the "contractor" exclusion the United States was not accountable for the negligence of the sheriff's employees and those employees were not acting on behalf of a federal agency in an official capacity within the meaning of the Act. *Held:*

1. The Court of Appeals correctly concluded that, contrary to petitioners' contention, the deputy marshal had no authority to control the activities of the sheriff's employees and that the jail was a "contractor," not a "Federal agency," within the meaning of the Act; and the statutory authorization for the housing of federal prisoners in state facilities clearly contemplated that the day-to-day operation of the contractor's facilities was to be in the contractor's, not the Government's, hands. Pp. 526–530.

2. Petitioners' alternative contention that even though the sheriff's employees might not be "employees" of a federal agency, they might nonetheless be "acting on behalf of a Federal agency in an official capacity" and thus "employee[s] of the Government" within the meaning of the Act is not consistent with the legislative purpose of the Act. Pp. 530–532.

3. The Court of Appeals, not having given consideration to the question of the deputy marshal's negligence apart from other issues, should address itself to that question on remand. Pp. 532–533.

459 F. 2d 408 and 463 F. 2d 1340, vacated and remanded.

REHNQUIST, J., delivered the opinion for a unanimous Court. STEWART and MARSHALL, JJ., filed a separate statement.

James DeAnda argued the cause for petitioners. With him on the brief were *J. Robert McKissick, Ed Idar, Jr., Mario Obledo,* and *Michael Mendelson.*

Mark L. Evans argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Wood,* and *Robert E. Kopp.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Reagan Logue, a federal prisoner confined in a county jail pending trial, fashioned a noose from a bandage covering a laceration on his left arm and hanged himself. His mother and adoptive father sued the United States for damages under the Federal Tort Claims Act, 28 U. S. C. § 1346 (b),[1] claiming that negligence on the part of Government agents and employees proximately caused the death of their son. The District Court determined that Logue's death was the result of negligence for which the United States was liable, and awarded damages. 334 F. Supp. 322 (SD Tex. 1971).

[1] "Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United

The Court of Appeals reversed this judgment, 459 F. 2d 408 (1972), rehearing en banc denied, 463 F. 2d 1340 (1972). We granted certiorari in order to consider the application to this case of the Act's exclusion of employees of a "contractor with the United States." 28 U. S. C. § 2671.

On May 22, 1968, Reagan Logue was arrested by Deputy United States Marshal Del Bowers on a bench warrant charging Logue with conspiracy to smuggle 229 pounds of marihuana into the United States. After a hearing, he was taken to the Nueces County jail in Corpus Christi, Texas, to await trial. This jail is one of some 800 institutions operated by state and local governments that contract with the Federal Bureau of Prisons to provide for the safekeeping, care, and subsistence of federal prisoners.[2]

States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U. S. C. § 1346 (b).

[2] The Federal Bureau of Prisons has statutory authority to contract with state prisons for the housing of federal prisoners:

"For the purpose of providing suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress, the Director of the Bureau of Prisons may contract, for a period not exceeding three years, with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistence, care, and proper employment of such persons.

"Such Federal prisoners shall be employed only in the manufacture of articles for, the production of supplies for, the construction of public works for, and the maintenance and care of the institutions of, the State or political subdivision in which they are imprisoned.

"The rates to be paid for the care and custody of said persons shall take into consideration the character of the quarters furnished, sanitary conditions, and quality of subsistence and may be such as will permit and encourage the proper authorities to provide rea-

On the day after his initial incarceration Logue attempted to commit suicide by slashing veins in his left arm. He was immediately taken to a hospital emergency room for treatment of the laceration. While the wound turned out to be relatively minor, Logue was admitted to the hospital's psychiatric floor because of the attending doctor's observation that he was actively hallucinating and out of touch with reality. The psychiatrist who later took charge of the case, recognizing Logue's suicidal tendencies, recommended to federal officials that he be committed to a medical facility for rehabilitation.[3]

On the following day, May 24, the District Court ordered that Logue be transferred to a federal medical facility pursuant to 18 U. S. C. § 4244. While awaiting the processing of papers and other steps preparatory to the actual transfer, however, federal officials made arrangements to transfer Logue back to the Nueces County jail.[4] Before the transfer, Bowers informed the chief jailer of Logue's suicidal tendencies and requested that he prepare for Logue a special cell removed of all dangerous objects that might be used in another suicide attempt. Such a cell was prepared by the jail authorities, and Logue was placed in it. Bowers made no specific arrangements for constant surveillance of Logue once he

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sonably decent, sanitary, and healthful quarters and subsistence for such persons." 18 U. S. C. § 4002.

The contract with the Nueces County jail incorporates by reference the standard of care set forth in this statute.

[3] There was testimony that Logue had twice before made suicide attempts.

[4] There was testimony at trial that it normally takes about a week or two after a commitment order has been entered before a prisoner can be physically transferred to a mental institution. There was also testimony that this process can be expedited to obtain commitment as early as 24 hours after an order has been signed.

was confined, and the jail employees made only periodic checks when they were on that floor for some other reason. The day after his return to the jail, Logue removed the Kerlix bandage that had been applied to the laceration on his left arm and hanged himself.

The District Court found that there had been a contract between the Government and Nueces County whereby the latter undertook to house federal prisoners in the county jail at Corpus Christi. That court nonetheless found that the United States was liable for the negligence of the employees of the Nueces County sheriff as well as for the negligence of its own employee. The court found the former to have been negligent because their surveillance of Logue was "inadequate," and it found Bowers to have been negligent in failing to make "specific arrangements . . . for constant surveillance of the prisoner."

The Court of Appeals reversed the judgment of the District Court, stating in its opinion that:

> "We interpret [18 U. S. C. § 4002] as fixing the status of the Nueces County jail as that of a 'contractor.' Title 28 U. S. C., Sec. 2671 . . . . This insulates the United States from liability under the FTCA for the negligent acts or omissions of the jail's employees. We find no support in the record for holding that Deputy Marshal Bowers had any power or authority to control any of the internal functions of the Nueces County jail. The deputy marshal, accordingly, violated no duty of safekeeping with respect to the deceased." 459 F. 2d, at 411.

The Federal Tort Claims Act makes the United States liable for money damages "caused by the negligent or wrongful act or omission of any employee of the Gov-

ernment . . . ." 28 U. S. C. § 1346 (b). Section 2671 of Title 28 U. S. C. contains the following definitions:

> "As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term 'Federal agency' includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.
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> " 'Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation."

For the Government to be liable for the negligence of an employee of the Nueces County jail, he must be shown to be an "employee of the Government" as that term is used in the Federal Tort Claims Act. Though petitioners do not always distinguish between their two theories, they appear to contend alternatively that the Nueces County jail is a "Federal agency" by reason of its contract for the care of federal prisoners, or that the employees of the jail are "acting on behalf of" the Bureau of Prisons or the Government in performing services for federal prisoners. The Court of Appeals rejected these contentions, and we believe that it was right in doing so.

We read that portion of the Court of Appeals' opinion quoted *supra* as treating the "contractor" exemption from the definition of "Federal agency" in § 2671 as adopting the common-law distinction between the liability of an employer for the negligent acts of his own employees

and his liability for the employees of a party with whom he contracts for a specified performance. Both the modern common law as reflected in the Restatement of Agency [5] and the law of Texas [6] make the distinction between the servant or agent relationship and that of independent contractor turn on the absence of authority in the principal to control the physical conduct of the contractor in performance of the contract.

In *Maryland* v. *United States*, 381 U. S. 41 (1965), one of the factors relied upon by the Court in determining that both military and civilian National Guard personnel were employees of the States, rather than of the United States, for purposes of the Federal Tort Claims Act, was the "supervision exercised by the States over both military and civilian personnel," *id.*, at 53. The courts of appeals that have had occasion to decide the question appear to have unvaryingly held that the "contractor with the United States" language of § 2671 adopts the traditional distinction between employees of the principal and employees of an independent contractor with the principal, and to have also held that the critical factor in making this determination is the authority of

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[5] Restatement (Second) of Agency § 2 (1958):

"(1) A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.

"(2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.

"(3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent."

[6] *E. g., Great Western Drilling Co.* v. *Simmons*, 157 Tex. 268, 302 S. W. 2d 400 (1957).

the principal to control the detailed physical performance of the contractor. See, *e. g.*, *Gowdy* v. *United States*, 412 F. 2d 525, 534 (CA6 1969); *Eutsler* v. *United States*, 376 F. 2d 634 (CA10 1967); *Yates* v. *United States*, 365 F. 2d 663 (CA4 1966); *Kirk* v. *United States*, 270 F. 2d 110 (CA9 1959).

Petitioners cite the commentary to the Restatement (Second) of Torts § 409 (1965), to the effect that the common-law distinction that shields the employer from liability for injuries caused to another by the negligent act of a contractor or his servant is subject to so many exceptions that it is the general rule "only in the sense that it is applied where no good reason is found for departing from it." Congress, of course, could have left the determination as to whose negligence the Government should be liable for under the Federal Tort Claims Act to the law of the State involved, as it did with other aspects of liability under the Act. But it chose not to do this, and instead incorporated into the definitions of the Act the exemption from liability for injury caused by employees of a contractor. While this congressional choice leaves the courts free to look to the law of torts and agency to define "contractor," it does not leave them free to abrogate the exemption that the Act provides.

Petitioners suggest that because 18 U. S. C. § 4042 imposes a duty on the Bureau of Prisons to "provide for the safekeeping, care, and subsistence of all persons charged with . . . offenses against the United States . . ." the Nueces County employees who were discharging the Government's obligation by contract should be held to be employees of the Government for purposes of liability under the Act.[7] This Court held in *United States* v. *Muniz*, 374 U. S. 150 (1963), that a breach of the

[7] This argument is also put in terms of a "non-delegable duty" owed by the Government to a prisoner under 18 U. S. C. § 4042.

duty imposed on the Government by 18 U. S. C. § 4042 was actionable under the Act. But the same public law that imposed this duty on the Government also authorized the Government to contract with state and local authorities to provide safekeeping and care:

> "For the purpose of providing suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress, the Director of the Bureau of Prisons may contract, for a period not exceeding three years, with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistence, care, and proper employment of such persons.
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> "The rates to be paid for the care and custody of said persons shall take into consideration the character of the quarters furnished, sanitary conditions, and quality of subsistence *and may be such as will permit and encourage the proper authorities to provide reasonably decent, sanitary, and healthful quarters and subsistence for such persons.*" 18 U. S. C. § 4002 (emphasis added).

Thus, Congress not only authorized the Government to make contracts such as the one here in question, but rather clearly contemplated that the day-to-day operations of the contractor's facilities were to be in the hands of the contractor, with the Government's role limited to the payment of sufficiently high rates to induce the contractor to do a good job. The contract entered into between the Government and Nueces County reflects a similar division of responsibility. The county undertakes to provide custody in accordance with the Bureau of Prisons' "rules and regulations governing the care and custody of persons committed" under the contract.

These rules in turn specify standards of treatment for federal prisoners, including methods of discipline, rules for communicating with attorneys, visitation privileges, mail, medical services, and employment. But the agreement gives the United States no authority to physically supervise the conduct of the jail's employees; it reserves to the United States only "the right to enter the institution . . . at reasonable hours for the purpose of inspecting the same and determining the conditions under which federal offenders are housed."

The Court of Appeals' conclusion that the deputy marshal had no authority to control the activities of the sheriff's employees is supported by both the enabling statute and the contract actually executed between the parties. We agree with its resultant holding that the sheriff's employees were employees of a "contractor with the United States," and not, therefore, employees of a "Federal agency."

The judges of the Court of Appeals who dissented from the denial of rehearing en banc pointed out that petitioners alternatively contended in that court, as they do here, that even though the sheriffs' employees might not be "employees" of a federal agency, they might nonetheless be "acting on behalf of a Federal agency in an official capacity . . . ." 463 F. 2d, at 1342. If petitioners were successful in establishing this contention, of course, an employee of the Nueces County jail would be an "employee of the government" under § 2671 even though he was not an "employee" of a federal agency.

The legislative history to which we are referred by the parties sheds virtually no light on the congressional purpose in enacting the "acting on behalf of" language of § 2671. The long gestation period of the Act in the committees of Congress has been recounted in *Dalehite* v. *United States,* 346 U. S. 15, 24–30 (1953), and this lengthy period may have something to do with the pau-

city of helpful committee reports on this point. One of the more immediate antecedents of the bill that Congress enacted contained identical "acting on behalf of" language: "and persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." H. R. 5373, 77th Cong., 2d Sess., § 101 (1942), quoted in Hearings on H. R. 5373 and H. R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess., ser. 13, p. 1 (1942). One of the appendices to the hearings on these bills compares the provisions of H. R. 6463, containing the "acting on behalf of" language, with previous drafts, and states that " 'Employee of the Government' in the present bill is defined to include uncompensated or temporary officers or employees of the United States." Hearings, *supra*, at 58. The committee's observation thus affords some support to the Government's contention that the language is designed to cover special situations such as the "dollar-a-year" man who is in the service of the Government without pay, or an employee of another employer who is placed under direct supervision of a federal agency pursuant to contract or other arrangement.

The dissenting judges in the Court of Appeals expressed the view that "when the Government decides that a particular individual should assume obligations and responsibilities virtually identical to those of a salaried Federal employee, there may very well be some persuasive basis for the suggestion that such an individual's breach of a specific statutory duty owed by the salaried employee to a specific class of persons should visit identical liability upon the United States." 463 F. 2d, at 1342–1343. But we are not persuaded that employees of a contractor with the Government, whose physical performance is not subject to governmental supervision, are to be treated as "acting on behalf of" a federal agency

simply because they are performing tasks that would otherwise be performed by salaried employees of the Government. If this were to be the law, the exclusion of contractors from the definition of "Federal agency" in § 2671 would be virtually meaningless, since it would be a rare situation indeed in which an independent contractor with the Government would be performing tasks that would not otherwise be performed by salaried Government employees.[8]

While we therefore agree with the conclusion of the Court of Appeals that the Government was not liable for the negligence of the employees of Nueces County, we disagree with its implicit determination that such a conclusion ends the case. For the District Court imposed liability on the Government, not only for the negligent acts of employees of the Nueces County sheriff, but also for negligent acts of Deputy Marshal Bowers, who was concededly an employee of the Government. The District Court found that Bowers, knowing of the prisoner's suicidal tendencies, should have made "specific arrangements . . . for constant surveillance of the prisoner," and that his failure to do so was negligence. The Court of Appeals in that portion of its opinion quoted *supra*, at 525, stated that "[t]he deputy marshal, accordingly,

[8] The two courts of appeals' cases relied upon by petitioners involved findings of control by the Government that are contrary to the determination of the Court of Appeals in this case. In *Close* v. *United States*, 130 U. S. App. D. C. 125, 397 F. 2d 686 (1968), the court reversed a summary judgment in favor of the Government, observing that there was no reason to assume that the Attorney General was without power to supervise the District of Columbia's jailer. The court expressly noted that no contention was made that the District of Columbia jail was a "contract" jail. *Id.*, at 126, 397 F. 2d, at 687. In *Witt* v. *United States*, 462 F. 2d 1261 (CA2 1972), the court held that the supervising employee "was certainly amenable to some degree of control by the Disciplinary Barracks," *id.*, at 1264, and that he was therefore "acting on behalf of" the Government.

violated no duty of safekeeping with respect to the deceased." 459 F. 2d, at 411. But that conclusion appears to us to follow from the court's discussion of the nature of the intergovernmental relationship and the status of the sheriff's employees rather than being a separate rejection of the finding of the District Court that Bowers himself was negligent. Since the Court of Appeals thus did not consider the distinct question regarding the negligence of Bowers, we believe that the parties' arguments on that question should be addressed in the first instance to the Court of Appeals.

We therefore vacate the judgment of the Court of Appeals and remand the case for consideration of the liability of the Government insofar as that liability may be based on the negligence of Deputy Marshal Bowers.

It is so ordered.

MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join the opinion of the Court upon the understanding that, upon remand, the Court of Appeals' consideration of Bowers' negligence will not be limited to his alleged failure to make "specific arrangements . . . for constant surveillance of the prisoner."

UNITED STATES *v.* NEVADA ET AL.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

No. 59, Orig. Argued April 16, 1973—Decided June 11, 1973

The United States asks leave to file a bill of complaint against California and Nevada seeking a declaration of the respective rights of the parties in the Truckee River, which flows through part of California into Nevada, terminating in Pyramid Lake. The complaint states that the United States created a reservation in 1859 for the Paiute Indian Tribe that included Pyramid Lake, and that the lake level has declined since 1906 due chiefly to upstream uses and diversions, making it imperative that the Government's prior right to sufficient water to maintain the lake be judicially declared. By decree entered in 1944, in *United States* v. *Orr Water Ditch Co.*, the Government was authorized to divert Truckee River water for a reclamation project upstream from Pyramid Lake, and its prior right was declared to sufficient Truckee River water to irrigate certain bottom land and bench land on the Pyramid Lake Reservation. The defendant States have made a compact, which is the subject of bills pending in Congress, respecting their shares of Truckee River water. *Held:* The motion to file the bill of complaint is denied without prejudice to refiling it if the posture of the litigation should change in a manner that presents a more substantial basis for the exercise of original jurisdiction. Pp. 537–540.

(a) There being no controversy between California and Nevada, the dispute is between the United States and two States, over which the Court has original but not exclusive jurisdiction under 28 U. S. C. § 1251 (b)(2). P. 537.

(b) The Court seeks to exercise its original jurisdiction sparingly, especially where the plaintiff has another adequate forum in which to settle his claim. P. 538.

(c) The disputes over the *Orr Water Ditch* decree and the existence of prior water rights concerning the Pyramid Lake Reservation involve competing claims within Nevada, over which the District Court has jurisdiction. Any possible dispute between the United States and California respecting Pyramid Lake water rights is remote, and any dispute with California concerning water

rights in that State can be settled in the lower federal courts in California. Pp. 538–540.

Motion denied.

Solicitor General Griswold argued the cause for the United States. With him on the briefs were *Assistant Attorney General Frizzell, Deputy Assistant Attorney General Kiechel,* and *Harry R. Sachse.*

E. Barrett Prettyman, Jr., argued the cause for defendant State of Nevada. With him on the brief were *Robert F. List,* Attorney General, *Timothy James Bloomfield,* and *Edward C. Reed, Jr. Roderick Walston,* Deputy Attorney General, argued the cause for defendant State of California. With him on the brief were *Evelle J. Younger,* Attorney General, *Carl Boronkay,* Assistant Attorney General, and *Bertram G. Buzzini* and *Dennis Antenore,* Deputy Attorneys General.*

PER CURIAM.

The United States asks leave to file a bill of complaint pursuant to this Court's original jurisdiction against the States of California and Nevada seeking a declaration of the respective rights of the States and of the United States in the Truckee River, a navigable interstate stream. The Truckee rises in the High Sierra, flows into Lake Tahoe, through which the California-Nevada boundary runs, exits on the California side of the Lake, and flows 20 miles before crossing into Nevada. It then

*Briefs of *amici curiae* in support of motion for leave to file bill of complaint were filed by *Robert S. Pelcyger, David H. Getches,* and *Robert D. Stitser* for the Pyramid Lake Paiute Tribe of Indians, and by *Arthur Lazarus, Jr.,* for the Association on American Indians Affairs, Inc.

James W. Johnson, Jr., and *E. J. Skeen* filed a brief for Truckee-Carson Irrigation District as *amicus curiae* in opposition to motion for leave to file bill of complaint.

continues another 65 miles, through Reno and beyond, to its termination in Pyramid Lake, a desert lake 20 miles long and five miles wide, with no outlet and a water level determined by the balance or imbalance between inflow and evaporation.

The bill of complaint sought to be filed states that in 1859 the United States created a reservation for the Paiute Indian Tribe that included Pyramid Lake and an extensive area surrounding it. Allegedly, the United States intended at the time to reserve sufficient water from the Truckee River to maintain Pyramid Lake and the lower reaches of the river as a viable fishery on which the Indians could depend for their subsistence and livelihood. The level of the Lake, however, is said to have declined some 70 feet since 1906, due chiefly to upstream uses and diversions which make it imperative that the prior right of the United States to sufficient water to maintain Pyramid Lake be judicially declared as against each of the defendant States.

It appears from the bill of complaint that the United States has several other interests in the waters of the Truckee River, chief among which is the right to divert at its Derby Dam, some distance upstream from Pyramid Lake, large amounts of water from the Truckee River for transportation and use in connection with the Newlands Reclamation Project, initiated and completed by the United States pursuant to the Reclamation Act of 1902, 32 Stat. 388.† Judicial approval for this diversion was

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†The United States also operates the Washoe Reclamation Project in Nevada and California which was established under the Washoe Project Act of 1956, 70 Stat. 775. The Act provides, *inter alia*, for establishing facilities to permit increased releases of water from Lake Tahoe and restoration of the Pyramid Lake fishery, 43 U. S. C. § 614c.

In addition to the right claimed for Pyramid Lake, the United States seeks to have rights decreed for it to the use of waters in and

sought by the United States in a suit brought by it in 1913 in the United States District Court for the District of Nevada. *United States* v. *Orr Water Ditch Co.*, Equity No. A–3 (1944). The decree entered in this action in 1944 authorized the United States to divert Truckee River water at Derby Dam for delivery to the Newlands Project; it also declared the prior right of the United States to sufficient Truckee River water to irrigate some 3,130 acres of bottom land and 2,745 acres of bench land on the Pyramid Lake Indian Reservation. App. D to Motion for Leave to File Complaint.

The foremost purpose of the United States in seeking to institute the present litigation is to perfect a prior water right against all upstream uses that will maintain Pyramid Lake at its current level and so prevent further deterioration of the lake and the river as a habitat for the native fish that have historically thrived in the lake and that have provided sustenance for the Tribe.

The motion for leave to file a bill of complaint is denied. The States of California and Nevada have entered into a compact with respect to their respective shares in the Truckee River water, and that compact is the subject of pending bills in Congress. H. R. 15, S. 24, 93d Cong., 1st Sess. There is now no controversy between the two States with respect to the Truckee River. The complaint, therefore, as the United States concedes, is not one alleging a case or controversy between two States within the exclusive jurisdiction of this Court, under 28 U. S. C. § 1251 (a), but a dispute between the United States and two States over which this Court has original but not exclusive jurisdiction under § 1251 (b)(2).

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on national forests within the Truckee River watershed, to waters reserved as public water holes and hot springs, to the use of waters in and on public lands where the waters have heretofore been put to beneficial use on those lands, and to the use of runoff waters from the Newlands Project for use in a wildlife refuge.

We seek to exercise our original jurisdiction sparingly and are particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim. *Illinois* v. *City of Milwaukee*, 406 U. S. 91 (1972); *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493 (1971); *Massachusetts* v. *Missouri*, 308 U. S. 1 (1939). Here, Nevada disputes the right of the United States to sufficient water to maintain Pyramid Lake at any particular level. It also asserts that the United States is bound by the 1944 *Orr Ditch* decree to respect the private water rights of hundreds of landowners who are served by the Newlands Project and whose rights are dependent upon the right of the United States to divert Truckee River water, the decree authorizing that diversion, and a contract with the United States to deliver the water to the project. This dispute over the *Orr Ditch* decree and the existence and extent of the prior water rights of the United States with respect to the Pyramid Lake Indian Reservation is within the jurisdiction of the District Court. We need not employ our original jurisdiction to settle competing claims to water within a single State. This is particularly the case where the individual users of water in the Newlands Project, who ordinarily would have no right to intervene in an original action in this Court, *New Jersey* v. *New York*, 345 U. S. 369, 373–375 (1953), would have an opportunity to participate in their own behalf if this litigation goes forward in the District Court.

We recognize that the United States will not be able to join California as a defendant in a suit in Nevada to perfect Pyramid Reservation water rights and that, absent California's voluntary appearance, a Nevada decree would not bind that State. *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 103 (1938). But these are not determinative considerations. Under the proposed interstate

compact, California and Nevada have agreed upon their respective shares of Truckee River water. Nevada has also agreed that any rights to the use of water in Nevada by the United States or its wards are to be charged against Nevada's share of Truckee water. For the purposes of dividing the waters of an interstate stream with another State, Nevada has the right, *parens patriae,* to represent all the nonfederal users in its own State insofar as the share allocated to the other State is concerned. It is therefore doubtful at best that there is now any dispute at all between California and the United States with respect to the latter's claim to water rights at Pyramid Lake. *New Jersey* v. *New York, supra,* at 372–373; *Hinderlider* v. *La Plata Co., supra,* at 106; *Nebraska* v. *Wyoming,* 295 U. S. 40, 43 (1935); 325 U. S. 589, 612–615, 629 (1945). It is true that upstream or downstream water uses and priorities are important considerations when the judiciary equitably apportions an interstate stream, *Hinderlider* v. *La Plata Co., supra,* at 102; *Nebraska* v. *Wyoming,* 325 U. S., at 617; *Wyoming* v. *Colorado,* 259 U. S. 419, 470 (1922), but the United States would appear to have occasion to object to upstream diversions in California on the grounds of interference with its Pyramid Lake water rights only if the compact between the two States is not approved or Nevada, prior to such approval, disowns the agreed-upon division of Truckee River water. In that event, a dispute between the two States may arise, and the United States would then perhaps have some ground to participate and assert that California's share must be reduced in order to accommodate a prior, long-established use by the United States in the State of Nevada. Cf. *Arizona* v. *California,* 373 U. S. 546 (1963); *Nebraska* v. *Wyoming, supra.* Any possible dispute with California with respect to United States water uses in that State

can be settled in the lower federal courts in California; and the possibility of a ripe controversy between the United States and California with respect to Pyramid Lake water rights appears too remote to warrant granting the Government's motion for leave to file the instant complaint. We deny the motion, but without prejudice to refiling it should the posture of the litigation change in a manner that presents a more substantial basis for the exercise of our original jurisdiction.

So ordered.

MR. JUSTICE DOUGLAS dissents.

Counsel

FRI, ACTING ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* SIERRA CLUB ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-804. Argued April 18, 1973—Decided June 11, 1973

Affirmed by an equally divided Court.

Deputy Solicitor General Wallace argued the cause for petitioner. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Frizzell, Harriet S. Shapiro, Edmund B. Clark,* and *Martin Green.*

Bruce J. Terris argued the cause for respondents. With him on the brief were *Helen C. Needham, Nathalie Vayssie Black,* and *James W. Moorman.**

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*Briefs of *amici curiae* urging reversal were filed by *Mark Wilmer, Rex E. Lee, Gary K. Nelson,* Attorney General, *J. A. Hughes, John Conway, William Duncan, Gordon Pearce, Richard G. Campbell, Lawrence V. Robertson, Jr.,* and *Donald E. Dickerman* for the State of Arizona and Ten Named Public Utilities; by *Andrew P. Miller,* Attorney General, and *C. Tabor Cronk,* Assistant Attorney General, for the Commonwealth of Virginia; by *Milton A. Smith* and *Stanley W. Schroeder* for the Chamber of Commerce of the United States; by *Cameron F. MacRae, G. S. Peter Bergen,* and *Henry V. Nickel* for the Edison Electric Institute; and by *Edward A. McCabe, Laurence P. Sherfy,* and *David W. Miller* for the American Mining Congress.

Briefs of *amici curiae* urging affirmance were filed by *Evelle J. Younger,* Attorney General, *pro se, Robert H. O'Brien,* Assistant Attorney General, and *Nicholas C. Yost, Anthony M. Summers,* and *C. Foster Knight,* Deputy Attorneys General, for the Attorney General of California; by *William J. Scott,* Attorney General, *Fred F. Herzog,* First Assistant Attorney General, and *Harvey M. Sheldon,* Assistant Attorney General, for the State of Illinois; by *Frank J. Kelley,* Attorney General, *Robert A. Derengoski,* Solicitor General, and *Jerome Maslowski, Stewart H. Freeman,* and *Charles S. Alpert,*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

MR. JUSTICE POWELL took no part in the decision of this case.

Assistant Attorneys General, for the State of Michigan, joined by *Warren Spannaus*, Attorney General, and *Curtis D. Forslund*, Solicitor General, for the State of Minnesota; by *Louis J. Lefkowitz*, Attorney General, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Philip Weinberg* and *James P. Corcoran*, Assistant Attorneys General, for the State of New York; by *John L. Hill*, Attorney General, *Larry F. York*, First Assistant Attorney General, and *Mike Willatt*, *Phil Maxwell*, and *Troy C. Webb*, Assistant Attorneys General, for the State of Texas; by *David L. Norvell*, Attorney General, for the State of New Mexico, joined by the Attorneys General for their respective States as follows: *William J. Baxley* of Alabama, *Robert Killian* of Connecticut, *Robert L. Shevin* of Florida, *Vern Miller* of Kansas, *William J. Guste, Jr.*, of Louisiana, *Jon A. Lund* of Maine, *Robert H. Quinn* of Massachusetts, *Louis J. Lefkowitz* of New York, *Robert Morgan* of North Carolina, *William J. Brown* of Ohio, *Lee L. Johnson* of Oregon, *Israel Packel* of Pennsylvania, *Kermit A. Sande* of South Dakota, *John L. Hill* of Texas, and *Kimberley B. Cheney* of Vermont; by *Norman Redlich* for the cities of New York and Boston; by *Alfred S. Forsyth* for the Association of the Bar of the city of New York; by *David H. Getches* for the Jicarilla Apache Tribe of Indians et al.; and by *Neal A. Jackson*, and *James F. Bromley* for Natural Resources Defense Council, Inc., et al.

DEAN *v.* GADSDEN TIMES PUBLISHING CORP.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF ALABAMA

No. 72-1310. Decided June 11, 1973

An Alabama statute that provides that an employee excused for jury duty "shall be entitled to his usual compensation . . . less the fee or compensation he received for serving" as a juror, does not deprive the employer of property in violation of the Due Process Clause of the Fourteenth Amendment. *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U. S. 421.

Certiorari granted; 49 Ala. App. 45, 268 So. 2d 829, reversed.

PER CURIAM.

Petitioner sued respondent, his employer, to recover compensation lost as a result of the employee's being required to serve as a juror. An Alabama statute provides that an employee excused for jury duty "shall be entitled to his usual compensation received from such employment less the fee or compensation he received for serving" as a juror. Ala. Code of 1940, Tit. 30, § 7(1) (Supp. 1971). It appears that petitioner served on a jury, received pay for the jury duty and submitted a bill of $63 to respondent, the difference between his regular wages and his jury pay. Respondent refused to pay; the trial court rendered a judgment for petitioner; but the Court of Civil Appeals of Alabama held the state Act unconstitutional. 49 Ala. App. 45, 268 So. 2d 829. The Supreme Court of Alabama denied certiorari to review that judgment. 289 Ala. 743, 268 So. 2d 834. The case is here on petition for a writ of certiorari which we grant.

The Court of Civil Appeals held that the Act deprives the employer of property in violation of the Due Process Clause of the Fourteenth Amendment, its main reliance

being on *Coppage* v. *Kansas*, 236 U. S. 1. *Coppage* declared unconstitutional as violative of due process a state statute which made it a misdemeanor for an employer to require an employee to agree not to join or remain a member of a union during his employment. That was when substantive due process was in its heyday. We cited *Coppage* along with other decisions of like tenor in *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, where we sustained a state statute which made it a misdemeanor for an employer to deduct wages of an employee for four hours when the employee absents himself from his job in order to vote. We held that the requirement placed on the employer to pay wages for this brief period when the employee is voting stood constitutional muster.

We said:

> "Most regulations of business necessarily impose financial burdens on the enterprise for which no compensation is paid. Those are part of the costs of our civilization. Extreme cases are conjured up where an employer is required to pay wages for a period that has no relation to the legitimate end. Those cases can await decision as and when they arise. The present law has no such infirmity. It is designed to eliminate any penalty for exercising the right of suffrage and to remove a practical obstacle to getting out the vote. The public welfare is a broad and inclusive concept. The moral, social, economic, and physical well-being of the community is one part of it; the political well-being, another. The police power which is adequate to fix the financial burden for one is adequate for the other. The judgment of the legislature that time out for voting should cost the employee nothing may be a debatable one. It is indeed conceded by the

opposition to be such. But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision. We could strike down this law only if we returned to the philosophy of the *Lochner*,[1] *Coppage*, and *Adkins*[2] cases." *Id.*, at 424–425.

The Alabama statute stands on no less sturdy a footing.

Reversed.

[1] *Lochner* v. *New York*, 198 U. S. 45.
[2] *Adkins* v. *Children's Hospital*, 261 U. S. 525.

GOLDSTEIN ET AL. *v.* CALIFORNIA

CERTIORARI TO THE APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

No. 71–1192. Argued December 13, 1972—Decided June 18, 1973

Petitioners, convicted for committing acts of "record piracy" or "tape piracy" in 1970–1971, challenge the California statute proscribing such practices, as violative of the "Copyright Clause," Art. I, § 8, cl. 8, of the Constitution, and the federal statutes enacted thereunder. The state appellate court upheld the validity of the statute. *Held:*

1. Article I, § 8, cl. 8, does not expressly or by inference vest all power to grant copyright protection exclusively in the Federal Government. Pp. 552–561.

(a) Although the objective of the Copyright Clause was to facilitate the granting of rights national in scope, it does not indicate that all "Writings" are of national interest or that protective state legislation is, in all cases, unnecessary or precluded. Pp. 555–558.

(b) No substantially prejudicial interstate conflicts result where some States grant copyright protection within their own jurisdictions while other States do not. Pp. 558–559.

(c) Conflicts will not necessarily arise between state enactments and congressional policy when States grant copyright protection. P. 559.

(d) Unless Congress determines that the national interest requires federal protection or freedom from restraint as to a particular category of "Writings," state protection of that category is not precluded. P. 559.

(e) The durational limitation imposed by the Copyright Clause on Congress does not invalidate state laws, like the one here, that have no such limitation. Pp. 560–561.

2. The California statute does not violate the Supremacy Clause by conflicting with federal copyright law. Pp. 561–570.

(a) Congress did not, in passing the Copyright Act of 1909, determine that recordings, as original writings, were unworthy of all copyright protection. Pp. 563–566.

(b) Nor did Congress in 17 U. S. C. § 4, which provides that "the works for which copyrights may be secured under this Act shall include all writings of an author," or in § 5, pre-empt state control over all works to which the term "writings" might apply.

Sears, Roebuck & Co. v. *Stiffel Co.*, 376 U. S. 225; *Compco Corp.* v. *Day-Brite Lighting*, 376 U. S. 234, distinguished. Pp. 567–569.

3. Although in 1971, the federal copyright statutes were amended to allow federal protection of recordings, such statutory protection was not intended to alter the legal relationships governing recordings "fixed" prior to February 15, 1972. Until and unless Congress takes further action with respect to recordings fixed prior to February 15, 1972, California remains free to proscribe acts of record or tape piracy such as those involved here. Pp. 570–571.

Affirmed.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., *post*, p. 572, and MARSHALL, J., *post*, p. 576, filed dissenting opinions, in which BRENNAN and BLACKMUN, JJ., joined.

Arthur Leeds argued the cause and filed briefs for petitioners.

David M. Schacter argued the cause for respondent. With him on the briefs was *Roger Arnebergh.**

**Francis M. Pinckney* filed a brief for Custom Recording Co., Inc., et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Evelle J. Younger*, Attorney General, *Edward A. Hinz, Jr.*, Chief Assistant Attorney General, *William E. James* and *Doris H. Maier*, Assistant Attorneys General, and *Charles P. Just*, Deputy Attorney General, for the State of California; by *Robert L. Shevin*, Attorney General, *pro se*, and *William J. Dunaj*, Special Assistant Attorney General, for the Attorney General of Florida; by *Louis J. Lefkowitz*, Attorney General, *pro se*, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Daniel M. Cohen*, Assistant Attorney General, for the Attorney General of New York; by *J. Shane Creamer*, Attorney General, for the Commonwealth of Pennsylvania; by *David M. Pack*, Attorney General of Tennessee; by *Crawford C. Martin*, Attorney General, *pro se*, and *Charles F. Herring* for the Attorney General of Texas; by *Sidney A. Diamond* and *Ernest S. Meyers* for Recording Industry Association of America, Inc.; by *Paul G. Zurkowski* for Information Industry Association; by *Henry Kaiser*, *Eugene Gressman*, *Ronald Rosenberg*, and *Mortimer Becker* for American Federation of Musicians et al.; and by *Julian T. Abeles* and *Robert C. Osterberg* for Harry Fox Agency, Inc.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to review petitioners' conviction under a California statute making it a criminal offense to "pirate" recordings produced by others.

In 1971, an information was filed by the State of California, charging petitioners in 140 counts with violating § 653h of the California Penal Code. The information charged that, between April 1970 and March 1971, petitioners had copied several musical performances from commercially sold recordings without the permission of the owner of the master record or tape.[1] Petitioners moved to dismiss the complaint on the grounds that § 653h was in conflict with Art. I, § 8, cl. 8, of the Con-

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[1] In pertinent part, the California statute provides:

"(a) Every person is guilty of a misdemeanor who:

"(1) Knowingly and willfully transfers or causes to be transferred any sounds recorded on a phonograph record, . . . tape, . . . or other article on which sounds are recorded, with intent to sell or cause to be sold, . . . such article on which such sounds are so transferred, without the consent of the owner.

"(2) . . .

. . . . . .

"(b) As used in this section, 'person' means any individual, partnership, corporation or association; and 'owner' means the person who owns the master phonograph record, . . . master tape, . . . or other device used for reproducing recorded sounds on phonograph records, . . . tapes, . . . or other articles on which sound is recorded, and from which the transferred recorded sounds are directly or indirectly derived."

Specifically, each count of the information alleged that, in regard to a particular recording, petitioners had, "at and in the City of Los Angeles, in the County of Los Angeles, State of California . . . wilfully, unlawfully and knowingly transferred and caused to be transferred sounds recorded on a tape with the intent to sell and cause to be sold, such tape on which such sounds [were] so transferred . . . ."

stitution,[2] the "Copyright Clause," and the federal statutes enacted thereunder. Upon denial of their motion, petitioners entered pleas of *nolo contendere* to 10 of the 140 counts; the remaining counts were dismissed. On appeal, the Appellate Department of the California Superior Court sustained the validity of the statute. After exhausting other state appellate remedies, petitioners sought review in this Court.

I

Petitioners were engaged in what has commonly been called "record piracy" or "tape piracy"—the unauthorized duplication of recordings of performances by major musical artists.[3] Petitioners would purchase from a retail distributor a single tape or phonograph recording of the popular performances they wished to duplicate. The original recordings were produced and marketed by recording companies with which petitioners had no contractual relationship. At petitioners' plant, the recording was reproduced on blank tapes, which could in turn be used to replay the music on a tape player. The tape was then wound on a cartridge. A label was attached, stating the title of the recorded performance—the same title as had appeared on the original recording, and the name of the performing artists.[4] After final packaging,

[2] Article I, § 8, cl. 8, provides that Congress shall have the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ."

[3] Since petitioners did not proceed to trial, the factual record before the Court is sparse. However, both parties indicate that a complete description of petitioners' method of operation may be found in the record of *Tape Industries Assn. of America* v. *Younger*, 316 F. Supp. 340 (CD Cal. 1970), appeal dismissed for lack of jurisdiction, 401 U. S. 902 (1971), appeal pending United States Court of Appeals, CA9, No. 26,628.

[4] An additional label was attached to each cartridge by petitioners, stating that no relationship existed between petitioners and the pro-

the tapes were distributed to retail outlets for sale to the public, in competition with those petitioners had copied.

Petitioners made no payments to the artists whose performances they reproduced and sold, or to the various trust funds established for their benefit; no payments were made to the producer, technicians, or other staff personnel responsible for producing the original recording and paying the large expenses incurred in production.[5] No payments were made for the use of the artists' names or the album title.

The challenged California statute forbids petitioners to transfer any performance fixed on a tape or record onto other records or tapes with the intention of selling the duplicates, unless they have first received permission from those who, under state law, are the owners of the master recording. Although the protection afforded to each master recording is substantial, lasting for an unlimited time, the scope of the proscribed activities is narrow. No limitation is placed on the use of the music, lyrics, or arrangement employed in making the master recording. Petitioners are not precluded from hiring their own musicians and artists and recording an exact imitation of the performance embodied on the master recording. Petitioners are even free to hire the same artists who made the initial recording in order to

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ducer of the original recording or the individuals whose performances had been recorded. Consequently, no claim is made that petitioners misrepresented the source of the original recordings or the manufacturer of the tapes.

[5] The costs of producing a single original longplaying record of a musical performance may exceed $50,000 or $100,000. *Tape Industries Assn. of America* v. *Younger, supra,* at 344; Hearings on S. 646 and H. R. 6927 before Subcommittee No. 3 of the House Committee on the Judiciary, 92d Cong., 1st Sess., 27–28 (1971). For the performance recorded on this record, petitioners would pay only the retail cost of a single longplaying record or a single tape.

duplicate the performance. In essence, the statute thus provides copyright protection solely for the specific expressions which compose the master record or tape.

Petitioners' attack on the constitutionality of § 653h has many facets. First, they contend that the statute establishes a state copyright of unlimited duration, and thus conflicts with Art. I, § 8, cl. 8, of the Constitution. Second, petitioners claim that the state statute interferes with the implementation of federal policies inherent in the federal copyright statutes. 17 U. S. C. § 1 *et seq.* According to petitioners, it was the intention of Congress, as interpreted by this Court in *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225 (1964), and *Compco Corp.* v. *Day-Brite Lighting*, 376 U. S. 234 (1964), to establish a uniform law throughout the United States to protect original writings. As part of the federal scheme, it is urged that Congress intended to allow individuals to copy any work which was not protected by a federal copyright. Since § 653h effectively prohibits the copying of works which are not entitled to federal protection, petitioners contend that it conflicts directly with congressional policy and must fall under the Supremacy Clause of the Constitution. Finally, petitioners argue that 17 U. S. C. § 2, which allows States to protect unpublished writings,[6] does not authorize the challenged state provision; since the records which petitioners copied had previously been released to the public, petitioners contend that they had, under federal law, been published.

We note at the outset that the federal copyright statutes to which petitioners refer were amended by Con-

[6] Title 17 U. S. C. § 2 provides: "Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor."

gress while their case was pending in the state courts. In 1971, Pub. L. 92–140, 85 Stat. 391, 17 U. S. C. §§ 1 (f), 5 (n), 19, 20, 26, 101 (e), was passed to allow federal copyright protection of recordings. However, § 3 of the amendment specifically provides that such protection is to be available only to sound recordings "fixed, published, and copyrighted" on and after February 15, 1972, and before January 1, 1975, and that nothing in Title 17, as amended is to "be applied retroactively or [to] be construed as affecting in any way any rights with respect to sound recordings fixed before" February 15, 1972. The recordings which petitioners copied were all "fixed" prior to February 15, 1972. Since, according to the language of § 3 of the amendment, Congress did not intend to alter the legal relationships which govern these recordings, the amendments have no application in petitioners' case.[7]

II

Petitioners' first argument rests on the premise that the state statute under which they were convicted lies beyond the powers which the States reserved in our federal system. If this is correct, petitioners must prevail, since the States cannot exercise a sovereign power which, under the Constitution, they have relinquished to the Federal Government for its exclusive exercise.

A

The principles which the Court has followed in construing state power were stated by Alexander Hamilton in Number 32 of The Federalist:

> "An entire consolidation of the States into one complete national sovereignty would imply an entire subordination of the parts; and whatever powers might remain in them, would be altogether depend-

[7] No question is raised in the present case as to the power of the States to protect recordings fixed after February 15, 1972.

> ent on the general will. But as the plan of the [Constitutional] convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*." [8]

The first two instances mentioned present no barrier to a State's enactment of copyright statutes. The clause of the Constitution granting to Congress the power to issue copyrights does not provide that such power shall vest exclusively in the Federal Government. Nor does the Constitution expressly provide that such power shall not be exercised by the States.

In applying the third phase of the test, we must examine the manner in which the power to grant copyrights may operate in our federal system. The objectives of our inquiry were recognized in *Cooley* v. *Board of Wardens,* 12 How. 299 (1852), when, in determining whether the power granted to Congress to regulate commerce [9] was "compatible with the existence of a similar power in the States," the Court noted:

> "Whatever subjects of this power are in their nature

[8] The Federalist No. 32, p. 241 (B. Wright ed. 1961); see *Cooley* v. *Board of Wardens,* 12 How. 299, 318–319 (1851).

[9] Art. I, § 8, cl. 3.

> national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." *Id.*, at 319.

The Court's determination that Congress alone may legislate over matters which are *necessarily* national in import reflects the basic principle of federalism. Mr. Chief Justice Marshall said,

> "The genius and character of the [federal] government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." *Gibbons* v. *Ogden*, 9 Wheat. 1, 195 (1824).

The question whether exclusive federal power must be inferred is not a simple one, for the powers recognized in the Constitution are broad and the nature of their application varied. The warning sounded by the Court in *Cooley* may equally be applicable to the Copyright Clause:

> "Either absolutely to affirm, or deny that the nature of [the federal power over commerce] requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part." 12 How., at 319.

We must also be careful to distinguish those situations in which the concurrent exercise of a power by the Federal Government and the States or by the States alone *may possibly* lead to conflicts and those situations where conflicts *will necessarily* arise. "It is not . . . a

mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of [state] sovereignty." The Federalist No. 32, p. 243 (B. Wright ed. 1961).

Article I, § 8, cl. 8, of the Constitution gives to Congress the power—

> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ."

The clause thus describes both the objective which Congress may seek and the means to achieve it. The objective is to promote the progress of science and the arts. As employed, the terms "to promote" are synonymous with the words "to stimulate," "to encourage," or "to induce." [10] To accomplish its purpose, Congress may grant to authors the exclusive right to the fruits of their respective works. An author who possesses an unlimited copyright may preclude others from copying his creation for commercial purposes without permission. In other words, to encourage people to devote themselves to intellectual and artistic creation, Congress may guarantee to authors and inventors a reward in the form of control over the sale or commercial use of copies of their works.

The objective of the Copyright Clause was clearly to facilitate the granting of rights national in scope. While the debates on the clause at the Constitutional Convention were extremely limited, its purpose was described by James Madison in the Federalist:

> "The utility of this power will scarcely be questioned. The copyright of authors has been solemnly

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[10] See *Kendall* v. *Winsor*, 21 How. 322, 328 (1859); *Mitchell* v. *Tilghman*, 19 Wall. 287, 418 (1874); *Bauer* v. *O'Donnell*, 229 U. S. 1, 10 (1913).

> adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress." [11]

The difficulty noted by Madison relates to the burden placed on an author or inventor who wishes to achieve protection in all States when no federal system of protection is available. To do so, a separate application is required to each state government; the right which in turn may be granted has effect only within the granting State's borders.[12] The national system which Madison supported eliminates the need for multiple applications and the expense and difficulty involved. In effect, it allows Congress to provide a reward greater in scope than any particular State may grant to promote progress in those fields which Congress determines are worthy of national action.

Although the Copyright Clause thus recognizes the potential benefits of a national system, it does not indicate

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[11] The Federalist No. 43, p. 309 (B. Wright ed. 1961).

[12] Numerous examples may be found in our early history of the difficulties which the creators of items of national import had in securing protection of their creations in all States. For example, Noah Webster, in his effort to obtain protection for his book, A Grammatical Institute of the English Language, brought his claim before the legislatures of at least six States, and perhaps as many as 12. See B. Bugbee, The Genesis of American Patent and Copyright Law 108–110, 120–124 (Wash., D. C., 1967); H. R. Rep. No. 2222, 60th Cong., 2d Sess., 2 (1909). Similar difficulties were experienced by John Fitch and other inventors who desired to protect their efforts to perfect a steamboat. See Federico, State Patents, 13 J. Pat. Off. Soc. 166, 170–176 (1931).

that all writings are of national interest or that state legislation is, in all cases, unnecessary or precluded. The patents granted by the States in the 18th century show, to the contrary, a willingness on the part of the States to promote those portions of science and the arts which were of local importance.[13] Whatever the diversity of people's backgrounds, origins, and interests, and whatever the variety of business and industry in the 13 Colonies, the range of diversity is obviously far greater today in a country of 210 million people in 50 States. In view of that enormous diversity, it is unlikely that all citizens in all parts of the country place the same importance on

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[13] As early as 1751, Massachusetts granted to Benjamin Crabb the exclusive right to employ a specific process for the manufacture of candles out of whale oil. It is not clear whether Crabb invented the process. The Acts and Resolves, Public and Private, of the Province of the Massachusetts Bay, Vol. 3, Session of Jan. 10, 1751, c. 19, pp. 546–547 (1878). In 1780, Pennsylvania granted a patent to Henry Guest for the processing of tanning oil and blubber, noting specifically that the patent was "a reward for his discovery and for the purpose of promoting useful manufactories in this state." The Statutes at Large of Pennsylvania from 1682 to 1801, Vol. 10, p. 132 (J. Mitchell & H. Flanders eds. 1904). Similarly, South Carolina granted protection to Peter Belin in 1786 for newly designed waterworks which aided in the production of rice, a staple of South Carolina agriculture, and other products. Another patent relating to the processing of rice was granted by South Carolina in 1788. The Statutes at Large of South Carolina, Vol. 4, p. 755 (T. Cooper ed. 1838); *id.*, Vol. 5, p. 69 (1839). In 1787, Maryland granted a patent on a spinning and carding machine "to encourage useful inventions, as well as promote the manufacture of cotton and wool within this state . . . ." The Laws of Maryland, Vol. 2, Session of Nov. 6, 1786–Jan. 20, 1787, c. 23 (W. Kilty ed. 1800). In the same year, Pennsylvania patented certain devices relating to flour mills, noting that these devices would "tend to simplify and render cheap the manufacture of flour which is one of the principal staples of this commonwealth . . . ." The Statutes at Large of Pennsylvania from 1682 to 1801, Vol. 12, pp. 483–484 (J. Mitchell & H. Flanders eds. 1906).

works relating to all subjects. Since the subject matter to which the Copyright Clause is addressed may thus be of purely local importance and not worthy of national attention or protection, we cannot discern such an unyielding national interest as to require an inference that state power to grant copyrights has been relinquished to *exclusive* federal control.

The question to which we next turn is whether, in actual operation, the exercise of the power to grant copyrights by some States will prejudice the interests of other States. As we have noted, a copyright granted by a particular State has effect only within its boundaries. If one State grants such protection, the interests of States which do not are not prejudiced since their citizens remain free to copy within their borders those works which may be protected elsewhere. The interests of a State which grants copyright protection may, however, be adversely affected by other States that do not; individuals who wish to purchase a copy of a work protected in their own State will be able to buy unauthorized copies in other States where no protection exists. However, this conflict is neither so inevitable nor so severe as to compel the conclusion, that state power has been relinquished to the exclusive jurisdiction of the Congress. Obviously when some States do not grant copyright protection—and most do not—that circumstance reduces the economic value of a state copyright, but it will hardly render the copyright worthless. The situation is no different from that which may arise in regard to other state monopolies, such as a state lottery, or a food concession in a limited enclosure like a state park; in each case, citizens may escape the effect of one State's monopoly by making purchases in another area or another State. Similarly, in the case of state copyrights, except as to individuals willing to travel across state lines in order to purchase records or other writings protected in their own State, each State's

copyrights will still serve to induce new artistic creations within that State—the very objective of the grant of protection. We do not see here the type of prejudicial conflicts which would arise, for example, if each State exercised a sovereign power to impose imposts and tariffs; [14] nor can we discern a need for uniformity such as that which may apply to the regulation of interstate shipments.[15]

Similarly, it is difficult to see how the concurrent exercise of the power to grant copyrights by Congress and the States will necessarily and inevitably lead to difficulty. At any time Congress determines that a particular category of "writing" is worthy of national protection and the incidental expenses of federal administration, federal copyright protection may be authorized. Where the need for free and unrestricted distribution of a writing is thought to be required by the national interest, the Copyright Clause and the Commerce Clause would allow Congress to eschew all protection. In such cases, a conflict would develop if a State attempted to protect that which Congress intended to be free from restraint or to free that which Congress had protected. However, where Congress determines that neither federal protection nor freedom from restraint is required by the national interest, it is at liberty to stay its hand entirely.[16] Since state protection would not then conflict with federal action, total relinquishment of the States' power to grant copyright protection cannot be inferred.

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[14] The Federalist No. 42, p. 305 (B. Wright ed. 1961).

[15] Cf. *Morgan* v. *Virginia*, 328 U. S. 373 (1946); *Bibb* v. *Navajo Freight Lines*, 359 U. S. 520 (1959); *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761 (1945); *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923).

[16] For example, Congress has allowed writings which may eventually be the subject of a federal copyright, to be protected under state law prior to publication. 17 U. S. C. § 2.

As we have seen, the language of the Constitution neither explicitly precludes the States from granting copyrights nor grants such authority exclusively to the Federal Government. The subject matter to which the Copyright Clause is addressed may at times be of purely local concern. No conflict will necessarily arise from a lack of uniform state regulation, nor will the interest of one State be significantly prejudiced by the actions of another. No reason exists why Congress must take affirmative action either to authorize protection of all categories of writings or to free them from all restraint. We therefore conclude that, under the Constitution, the States have not relinquished all power to grant to authors "the exclusive Right to their respective Writings."

B

Petitioners base an additional argument on the language of the Constitution. The California statute forbids individuals to appropriate recordings at any time after release. From this, petitioners argue that the State has created a copyright of *unlimited* duration, in violation of that portion of Art. I, § 8, cl. 8, which provides that copyrights may only be granted "for limited Times." Read literally, the text of Art. I does not support petitioners' position. Section 8 enumerates those powers which have been granted *to Congress;* whatever limitations have been appended to such powers can only be understood as a limit on congressional, and not state, action. Moreover, it is not clear that the dangers to which this limitation was addressed apply with equal force to both the Federal Government and the States. When Congress grants an exclusive right or monopoly, its effects are pervasive; no citizen or State may escape its reach. As we have noted, however, the exclusive right granted by a State is confined to its

borders. Consequently, even when the right is unlimited in duration, any tendency to inhibit further progress in science or the arts is narrowly circumscribed. The challenged statute cannot be voided for lack of a durational limitation.

III

Our conclusion that California did not surrender its power to issue copyrights does not end the inquiry. We must proceed to determine whether the challenged state statute is void under the Supremacy Clause. No simple formula can capture the complexities of this determination; the conflicts which may develop between state and federal action are as varied as the fields to which congressional action may apply. "Our primary function is to determine whether, under the circumstances of this particular case, [the state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz,* 312 U. S. 52, 67 (1941). We turn, then, to federal copyright law to determine what objectives Congress intended to fulfill.

By Art. I, § 8, cl. 8, of the Constitution, the States granted to Congress the power to protect the "Writings" of "Authors." These terms have not been construed in their narrow literal sense but, rather, with the reach necessary to reflect the broad scope of constitutional principles. While an "author" may be viewed as an individual who writes an original composition, the term, in its constitutional sense, has been construed to mean an "originator," "he to whom anything owes its origin." *Burrow-Giles Lithographic Co.* v. *Sarony,* 111 U. S. 53, 58 (1884). Similarly, although the word "writings" might be limited to script or printed material, it may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor.

Ibid.; Trade-Mark Cases, 100 U. S. 82, 94 (1879). Thus, recordings of artistic performances may be within the reach of Clause 8.

While the area in which Congress *may* act is broad, the enabling provision of Clause 8 does not require that Congress act in regard to all categories of materials which meet the constitutional definitions. Rather, whether any specific category of "Writings" is to be brought within the purview of the federal statutory scheme is left to the discretion of the Congress. The history of federal copyright statutes indicates that the congressional determination to consider specific classes of writings is dependent, not only on the character of the writing, but also on the commercial importance of the product to the national economy. As our technology has expanded the means available for creative activity and has provided economical means for reproducing manifestations of such activity, new areas of federal protection have been initiated.[17]

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[17] The first congressional copyright statute, passed in 1790, governed only maps, charts, and books. Act of May 31, 1790, c. 15, 1 Stat. 124. In 1802, the Act was amended in order to grant protection to any person "who shall invent and design, engrave, etch or work . . . any historical or other print or prints . . . ." Act of Apr. 29, 1802, c. 36, 2 Stat. 171. Protection was extended to musical compositions when the copyright laws were revised in 1831. Act of Feb. 3, 1831, c. 16, 4 Stat. 436. In 1865, at the time when Mathew Brady's pictures of the Civil War were attaining fame, photographs and photographic negatives were expressly added to the list of protected works. Act of Mar. 3, 1865, c. 126, 13 Stat. 540. Again in 1870, the list was augmented to cover paintings, drawings, chromos, statuettes, statuary, and models or designs of fine art. Act of July 8, 1870, c. 230, 16 Stat. 198.

In 1909, Congress agreed to a major consolidation and amendment of all federal copyright statutes. A list of 11 categories of protected works was provided. The relevant sections of the Act are discussed in the text of our opinion. The House Report on the proposed bill specifically noted that amendment was required because

Petitioners contend that the actions taken by Congress in establishing federal copyright protection preclude the States from granting similar protection to recordings of musical performances. According to petitioners, Congress addressed the question of whether recordings of performances should be granted protection in 1909; Congress determined that any individual who was entitled to a copyright on an original musical composition should have the right to control to a limited extent the use of that composition on recordings, but that the record itself, and the performance which it was capable of reproducing were not worthy of such protection.[18] In

"the reproduction of various things which are the subject of copyright has enormously increased," and that the President has specifically recommended revision, among other reasons, because the prior laws "omit[ted] provision for many articles which, under modern reproductive processes, are entitled to protection." H. R. Rep. No. 2222, *supra*, n. 12, at 1 (quoting Samuel J. Elder and President Theodore Roosevelt).

Since 1909, two additional amendments have been added. In 1912, the list of categories in § 5 was expanded specifically to include motion pictures. The House Report on the amendment noted:

"The occasion for this proposed amendment is the fact that the production of motion-picture photoplays and motion pictures other than photoplays has become a business of vast proportions. The money invested therein is so great and the property rights so valuable that the committee is of the opinion that the copyright law ought to be so amended as to give to them distinct and definite recognition and protection." H. R. Rep. No. 756, 62d Cong., 2d Sess., 1 (1912).

Finally, in 1971, § 5 was amended to include "sound recordings." Congress was spurred to action by the growth of record piracy, which was, in turn, due partly to technological advances. See Hearings on S. 646 and H. R. 6927, *supra*, n. 5, at 4–5, 11 (1971). It must be remembered that the "record piracy" charged against petitioners related to recordings fixed by the original producer prior to Feb. 15, 1972, the effective date of the 1971 Act. See *supra*, at 551–552.

[18] 17 U. S. C. § 1 (e).

support of their claim, petitioners cite the House Report on the 1909 Act, which states:

> "It is not the intention of the committee to extend the right of copyright to the mechanical reproductions themselves, but only to give the composer or copyright proprietor the control, in accordance with the provisions of the bill, of the manufacture and use of such devices." H. R. Rep. No. 2222, 60th Cong., 2d Sess., 9 (1909).

To interpret accurately Congress' intended purpose in passing the 1909 Act and the meaning of the House Report petitioners cite, we must remember that our modern technology differs greatly from that which existed in 1909. The Act and the report should not be read as if they were written today, for to do so would inevitably distort their intended meaning; rather, we must read them against the background of 1909, in which they were written.

In 1831, Congress first extended federal copyright protection to original musical compositions. An individual who possessed such a copyright had the exclusive authority to sell copies of the musical score; individuals who purchased such a copy did so for the most part to play the composition at home on a piano or other instrument. Between 1831 and 1909, numerous machines were invented which allowed the composition to be reproduced mechanically. For example, one had only to insert a piano roll or disc with perforations in appropriate places into a player piano to achieve almost the same results which previously required someone capable of playing the instrument. The mounting sales of such devices detracted from the value of the copyright granted for the musical composition. Individuals who had use of a piano roll and an appropriate instrument had little, if any, need for a copy of the sheet

music.[19] The problems which arose eventually reached this Court in 1908 in the case of *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U. S. 1. There, the Apollo Company had manufactured piano rolls capable of reproducing mechanically compositions covered by a copyright owned by appellant. Appellant contended that the piano rolls constituted "copies" of the copyrighted composition and that their sale, without permission, constituted an infringement of the copyright. The Court held that piano rolls, as well as records, were not "copies" of the copyrighted composition, in terms of the federal copyright statutes, but were merely component parts of a machine which executed the composition.[20] Despite the fact that the piano rolls employed the creative work of the composer, all protection was denied.

It is against this background that Congress passed the 1909 statute. After pointedly waiting for the Court's decision in *White-Smith Music Publishing Co.*,[21] Congress determined that the copyright statutes should be amended to insure that *composers of original musical works* received adequate protection to encourage further artistic and creative effort. Henceforth, under § 1 (e),

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[19] H. R. Rep. No. 7083, 59th Cong., 2d Sess., pt. 2, p. 2 (1907) (Minority Report).

[20] "After all, what is the perforated roll? The fact is clearly established in the testimony in this case that even those skilled in the making of these rolls are unable to read them as musical compositions, as those in staff notation are read by the performer. . . .

"These perforated rolls are parts of a machine which, when duly applied and properly operated in connection with the mechanism to which they are adapted, produce musical tones in harmonious combination. But we cannot think that they are copies within the meaning of the copyright act." *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U. S. 1, 18 (1908).

[21] H. R. Rep. No. 7083, *supra*, n. 19, pt. 1, at 10; pt. 2, at 3–4.

records and piano rolls were to be considered as "copies" of the original composition they were capable of reproducing, and could not be manufactured unless payment was made to the *proprietor of the composition copyright*. The section of the House Report cited by petitioners was intended only to establish the limits of *the composer's* right; composers were to have no control over the recordings themselves. Nowhere does the report indicate that Congress considered records as anything but a component part of a machine, capable of reproducing an original composition [22] or that Congress intended records, as *renderings of original artistic performance*, to be free from state control.[23]

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[22] This is especially clear from the comment made by the Committee on Patents in regard to a foreign statute which, to some extent, protected performances. The committee stated that the foreign statute "in no way affects the reproduction of such music by phonographs, graphophones, or the ordinary piano-playing instruments, for in these instruments the reproduction is purely mechanical." H. R. Rep. No. 2222, *supra*, n. 12, at 5.

[23] Petitioners do not argue that § 653h conflicts with that portion of 17 U. S. C. § 1 (e) which provides:

"[W]henever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured . . . ."

Assuming, *arguendo*, that petitioners' use of the composition they duplicated constitutes a "similar use," the challenged state statute might be claimed to diminish the return which is due the composer by lessening the number of copies produced, and thus to conflict with § 1 (e). However, as we have noted above, the means presently available for reproducing recordings were not in existence in 1909 when 17 U. S. C. § 1 (e) was passed. We see no indication that the challenged state statute detracts from royalties which Congress intended the composer to receive. Furthermore, many state statutes may diminish the number of copies produced. Taxing statutes, for

Petitioners' argument does not rest entirely on the belief that Congress intended specifically to exempt recordings of performances from state control. Assuming that no such intention may be found, they argue that Congress so occupied the field of copyright protection as to pre-empt all comparable state action. *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218 (1947). This assertion is based on the language of 17 U. S. C. §§ 4 and 5, and on this Court's opinions in *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225 (1964), and *Compco Corp.* v. *Day-Brite Lighting*, 376 U. S. 234 (1964).

Section 4 of the federal copyright laws provides:

> "The works for which copyright may be secured under this title shall include all the writings of an author." 17 U. S. C. § 4.

Section 5, which lists specific categories of protected works, adds:

> "The above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title . . . ." 17 U. S. C. § 5.

Since § 4 employs the constitutional term "writings," [24] it may be argued that Congress intended to exercise its authority over all works to which the constitutional provision might apply. However, in the more than 60 years which have elapsed since enactment of this provision, neither the Copyright Office, the courts, nor the Congress has so interpreted it. The Register of Copyrights,

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example, may raise the cost of producing or selling records and thereby lessen the number of records which may be sold or inhibit new companies from entering this field of commerce. We do not see in these statutes the direct conflict necessary to render a state statute invalid.

[24] H. R. Rep. No. 2222, *supra*, n. 12, at 10.

who is charged with administration of the statute, has consistently ruled that "claims to exclusive rights in mechanical recordings . . . or in the performances they reproduce" are not entitled to protection under § 4. 37 CFR § 202.8 (b) (1972).[25] With one early exception,[26] American courts have agreed with this interpretation; [27] and in 1971, prior to passage of the statute which extended federal protection to recordings fixed on or after February 15, 1972, Congress acknowledged the validity of that interpretation. Both the House and Senate Reports on the proposed legislation recognized that recordings qualified as "writings" within the meaning of the Constitution, but had not previously been protected under the federal copyright statute. H. R. Rep. No. 92–487, pp. 2, 5 (1971); S. Rep. No. 92–72, p. 4 (1971). In light of this consistent interpretation by the courts, the agency empowered to administer the copyright stat-

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[25] The registration of records under the provisions of the 1909 Act would give rise to numerous administrative difficulties. It is difficult to discern how an individual who wished to copyright a record could comply with the notice and deposit provisions of the statute. 17 U. S. C. §§ 12, 13, 19, 20. Nor is it clear to whom the copyright could rightfully be issued or what constituted publication. Finally, the administrative and economic burden of classifying and maintaining copies of records would have been considerable. See Chafee, Reflections on the Law of Copyright; II, 45 Col. L. Rev. 719, 735 (1945); Ringer, The Unauthorized Duplication of Sound Recordings, Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 86th Cong., 2d Sess., 2 (comm. print 1961); Hearings on S. 646 and H. R. 6927 *supra*, n. 5, at 11, 14.

[26] *Fonotipia, Ltd.* v. *Bradley*, 171 F. 951, 963 (EDNY 1909).

[27] *Aeolian Co.* v. *Royal Music Roll Co.*, 196 F. 926, 927 (WDNY 1912); *Waring* v. *WDAS Broadcasting Station*, 327 Pa. 433, 437–438, 194 A. 631, 633–634 (1937); *Capitol Records, Inc.* v. *Mercury Records Corp.*, 221 F. 2d 657, 661–662 (CA2 1955); *Jerome* v. *Twentieth Century Fox-Film Corp.*, 67 F. Supp. 736, 742 (SDNY 1946).

utes, and Congress itself, we cannot agree that §§ 4 and 5 have the broad scope petitioners claim.

Sears and *Compco*, on which petitioners rely, do not support their position. In those cases, the question was whether a State could, under principles of a state unfair competition law, preclude the copying of mechanical configurations which did not possess the qualities required for the granting of a federal design or mechanical patent. The Court stated:

> "[T]he patent system is one in which uniform federal standards are carefully used to promote invention while at the same time preserving free competition. Obviously a State could not, consistently with the Supremacy Clause of the Constitution, extend the life of a patent beyond its expiration date or give a patent on an article which lacked the level of invention required for federal patents. To do either would run counter to the policy of Congress of granting patents only to true inventions, and then only for a limited time. Just as a State cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws." *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S., at 230–231 (footnotes omitted).

In regard to mechanical configurations, Congress had balanced the need to encourage innovation and originality of invention against the need to insure competition in the sale of identical or substantially identical products. The standards established for granting federal patent protection to machines thus indicated not only which articles in this particular category Congress wished to protect, but which configurations it wished to remain free. The application of state law in these cases to pre-

vent the copying of articles which did not meet the requirements for federal protection disturbed the careful balance which Congress had drawn and thereby necessarily gave way under the Supremacy Clause of the Constitution. No comparable conflict between state law and federal law arises in the case of recordings of musical performances. In regard to this category of "Writings," Congress has drawn no balance; rather, it has left the area unattended, and no reason exists why the State should not be free to act.[28]

IV

More than 50 years ago, Mr. Justice Brandeis observed in dissent in *International News Service* v. *Associated Press:*

> "The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use." 248 U. S. 215, 250 (1918).

But there is no fixed, immutable line to tell us which "human productions" are private property and which are so general as to become "free as the air." In earlier times, a performing artist's work was largely restricted to the stage; once performed, it remained "recorded" only in the memory of those who had seen or heard it. Today, we can record that performance in precise detail

[28] Petitioners place great stress on their belief that the records or tapes which they copied had been "published." We have no need to determine whether, *under state law,* these recordings had been published or what legal consequences such publication might have. *For purposes of federal law,* "publication" serves only as a term of the art which defines the legal relationships which Congress has adopted under the federal copyright statutes. As to categories of writings which Congress has not brought within the scope of the federal statute, the term has no application.

and reproduce it again and again with utmost fidelity. The California statutory scheme evidences a legislative policy to prohibit "tape piracy" and "record piracy," conduct that may adversely affect the continued production of new recordings, a large industry in California. Accordingly, the State has, by statute, given to recordings the attributes of property. No restraint has been placed on the use of an idea or concept; rather, petitioners and other individuals remain free to record the same compositions in precisely the same manner and with the same personnel as appeared on the original recording.

In sum, we have shown that § 653h does not conflict with the federal copyright statute enacted by Congress in 1909. Similarly, no conflict exists between the federal copyright statute passed in 1971 and the present application of § 653h, since California charged petitioners only with copying recordings fixed prior to February 15, 1972.[29] Finally, we have concluded that our decisions in *Sears* and *Compco,* which we reaffirm today, have no application in the present case, since Congress has indicated neither that it wishes to protect, nor to free from protection, recordings of musical performances fixed prior to February 15, 1972.

We conclude that the State of California has exercised a power which it retained under the Constitution, and that the challenged statute, as applied in this case, does not intrude into an area which Congress has, up to now, pre-empted. Until and unless Congress takes further action with respect to recordings fixed prior to February 15, 1972, the California statute may be enforced against acts of piracy such as those which occurred in the present case.

Affirmed.

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[29] *Supra,* at 551–552.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN concur, dissenting.

Article I, § 8, cl. 8, of the Constitution provides:

> "The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Madison made a brief comment on this provision governing both patents and copyrights:

> "The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress." [1]

We have been faithful to that admonition. In *Sears Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225, 230–231, we said:

> "Thus the patent system is one in which uniform federal standards are carefully used to promote invention while at the same time preserving free competition. Obviously a State could not, consistently with the Supremacy Clause of the Constitution, extend the life of a patent beyond its expiration date or give a patent on an article which lacked the level of invention required for federal patents. To do either would run counter to the policy of Congress of granting patents only to true inventions, and then only for a limited time. Just as a State cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection of a kind

[1] The Federalist No. 43, p. 309 (B. Wright ed. 1961).

> that clashes with the objectives of the federal patent laws."

An unpatentable article is "in the public domain and may be made and sold by whoever chooses to do so." *Id.*, at 231. In that case we did not allow a State to use its unfair competition law to prevent copying of an article which lacked such novelty that it could not be patented. In a companion case, *Compco Corp.* v. *Day-Brite Lighting*, 376 U. S. 234, 237, where an unfair competition charge was made under state law, we made the same ruling, stating:

> "Today we have held in *Sears, Roebuck & Co.* v. *Stiffel Co., supra,* that when an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in Art. I, § 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain."

Prior to February 25, 1972, copyright protection was not extended to sound recordings. *Sears* and *Compco* make clear that the federal policy expressed in Art. I, § 8, cl. 8, is to have "national uniformity in patent and copyright laws," 376 U. S., at 231 n. 7, a policy bolstered by Acts of Congress which vest "exclusive jurisdiction to hear patent and copyright cases in federal courts . . . and that section of the Copyright Act which expressly saves state protection of unpublished writings but does not include published writings." *Ibid.*

Prior to February 15, 1972,[2] sound recordings had no

[2] The effective date of Pub. L. 92–140, 85 Stat. 392.

copyright protection. And even under that Act the copyright would be effective "only to sound recordings fixed, published, and copyrighted on and after the effective date of this Act [Feb. 15, 1972] and before January 1, 1975." [3]

California's law promotes monopoly; the federal policy promotes monopoly only when a copyright is issued, and it fosters competition in all other instances. Moreover, federal law limits its monopoly to 28 years plus a like renewal period,[4] while California extends her monopoly into perpetuity.

Cases like *Sears* were surcharged with "unfair competition" and the present one with "pirated recordings." But free access to products on the market is the consumer interest protected by the failure of Congress to extend patents or copyrights into various areas. The drive for monopoly protection is strong as is evident from a reading of the committee reports on the 1971 Act.[5] Yet, Congress took but a short step, setting up a trial period to consider the new monopoly approach. It was told that state laws, such as we have in this case, were being challenged on the ground that the Federal Constitution had pre-empted the field, even in absence of a provision for making it possible to obtain a copyright for sound recordings. But the House Committee made only the following comment:

> "While the committee expresses no opinion concerning this legal question, it is clear that the extension of copyright protection to sound recordings would resolve many of the problems which have arisen in

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[3] *Id.*, § 3.

[4] 17 U. S. C. § 24.

[5] H. R. Rep. No. 92-487; S. Rep. No. 92-72.

connection with the efforts to combat piracy in State courts." [6]

The Department of Justice in commenting on the proposals that resulted in the 1971 Act told the House:

> "We believe that extending copyright to reproduction of sound recordings is the soundest, and in our interpretation of *Sears* and *Compco*, the only way in which sound recordings should be protected. Copyright protection is narrowly defined and limited in duration, whereas state remedies, whose validity is still in doubt, frequently create broad and unwarranted perpetual monopolies. Moreover, there is an immediate and urgent need for this protection." [7]

The need for uniformity was stated by Judge Learned Hand in a dissent in *Capitol Records, Inc.* v. *Mercury Records Corp.*, 221 F. 2d 657. That case involved the duplication of uncopyrighted sound recordings, the court holding that state law prevailed where there was no federal copyright provision. Judge Hand emphasized in his dissent that "uniformity" was one of the principal purposes of the Patent and Copyright Clause and that uniformity could be obtained only by pre-emption. He said:

> "If, for example in the case at bar, the defendant is forbidden to make and sell these records in New York, that will not prevent it from making and selling them in any other state which may regard the plaintiff's sales as a 'publication'; and it will be practically impossible to prevent their importation into New York. That is exactly the kind of evil at which the clause is directed." *Id.*, at 667.

I would reverse the judgment below.

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[6] H. R. Rep., *supra*, n. 5, at 3.

[7] *Id.*, at 13.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN join, dissenting.

The argument of the Court, as I understand it, is this: Art. I, § 8, cl. 8, of the Constitution gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The Framers recognized that individual States might have peculiarly local interests that Congress might not consider worthy of attention. Thus, the constitutional provision does not, of its own force, bar States from promoting those local interests. However, as the Court noted in *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225 (1964), with respect to every particular item within general classes enumerated in the relevant statutes, Congress had balanced the need to promote invention against the desire to preserve free competition, and had concluded that it was in the national interest to preserve competition as to every item that could not be patented. That is, the fact that some item could not be patented demonstrated that, in the judgment of Congress, it was best to let competition in the production of that item go unrestricted. The situation with regard to copyrights is said to be similar. There Congress enumerated certain classes of works for which a copyright may be secured. 17 U. S. C. § 5. Its silence as to other classes does not reflect a considered judgment about the relative importance of competition and promotion of "Science and useful Arts." Thus, the Court says, the States remain free to protect as they will "writings" not in the enumerated classes, until Congress acts. Since sound recordings fixed prior to February 15, 1972, were not enumerated by Congress as subject to copyrighting,[1] the States may protect such recordings.

[1] Sound recordings fixed after that date may be copyrighted. Pub. L. 92–140, 85 Stat. 391, 17 U. S. C. § 5 (n) (1970 ed., Supp. I).

With respect, I cannot accept the final step of this argument. In my view, Congress has demonstrated its desire to exercise the full grant of constitutional power. Title 17 U. S. C. § 4, states: "The works for which copyright may be secured under this title shall include *all the writings of an author*" (emphasis added). The use of the constitutional terms "writings" and "author" rather strongly suggests that Congress intended to follow the constitutional grant. It could exercise the power given it by the Constitution in two ways: either by protecting all writings, or by protecting all writings within designated classes and leaving open to competition all writings in other classes. Section 5 shows that the latter course was chosen, for it enumerates various classes of works that may be registered.[2] Ordinarily, the failure to enumerate "sound recordings" in § 5 would not be taken as an expression of Congress' desire to let free competition reign in the reproduction of such recordings, for, because of the realities of the legislative process, it is generally difficult to infer from a failure to act any affirmative conclusions. Cf. *Cleveland* v. *United States,* 329 U. S. 14, 22 (1946) (Rutledge, J., concurring). But in *Sears* and its companion case, *Compco Corp.* v. *Day-Brite Lighting,* 376 U. S. 234 (1964), the Court determined that with respect to patents and copyrights, the ordinary practice was not to prevail. In view of the importance of not imposing unnecessary restraints on competition, the Court adopted in those cases a rule of construction that, unless the failure to provide patent

[2] From the language of § 4 and the proviso of § 5, it could be rather strongly argued that Congress had intended to afford protection to every writing. I agree with the Court, however, that the consistent administrative interpretation of those sections, in conjunction with the practical difficulty of applying to novel cases certain statutory requirements, like that requiring placement of the notice of copyright on every copy, 17 U. S. C. § 10, precludes such an argument.

or copyright protection for some class of works could clearly be shown to reflect a judgment that state regulation was permitted, the silence of Congress would be taken to reflect a judgment that free competition should prevail. I do not find in *Sears* and *Compco* a limitation on that rule of construction to general classes that Congress has enumerated although, of course, on the facts of those cases only items in such classes were involved; rather, the broadest language was used in those cases.[3] Nor can I find in the course of legislation sufficient evidence to convince me that Congress determined to permit state regulation of the reproduction of sound recordings. For, whenever technological advances made extension of copyright protection seem wise, Congress has acted promptly. See *ante*, at 562–563, n. 17.[4] This seems to me to reflect the same judgment that the Court found in

[3] It bears noting that in *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225 (1964), the Court repeatedly referred to the patent and copyright statutes as if the same rules of interpretation applied to both. See, *e. g., id.*, at 228, 231 n. 7; *Compco Corp.* v. *Day-Brite Lighting*, 376 U. S. 234, 237 (1964).

[4] Between 1909 and 1951, Congress' attention was repeatedly drawn to problems of copyrighting sound recordings. Many bills to provide copyright protection for such recordings were introduced, but none were enacted. See Ringer, The Unauthorized Duplication of Sound Recordings, Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 86th Cong., 2d Sess., 21–37 (Comm. Print 1961). Respondent argues that Congress failed to enact these bills primarily out of uncertainty about the relationship between federal law and international copyright conventions, and was comforted in the knowledge that protection was available under state law. See Brief for Respondent 28–32. However, it is enough that Congress was aware of the problem, and could have acted, as it did when other technological innovations presented new problems, rather expeditiously. The problems that Congress confronted in 1971 did not spring up in 1970, but had existed, and Congress had not acted, for many years before.

Sears and *Compco:* Congress has decided that free competition should be the general rule, until it is convinced that the failure to provide copyright or patent protection is hindering "the Progress of Science and useful Arts."

The business of record piracy is not an attractive one; persons in the business capitalize on the talents of others without needing to assess independently the prospect of public acceptance of a performance. But the same might be said of persons who copy "mechanical configurations." Such people do provide low-cost reproductions that may well benefit the public. In light of the presumption of *Sears* and *Compco* that congressional silence betokens a determination that the benefits of competition outweigh the impediments placed on creativity by the lack of copyright protection, and in the absence of a congressional determination that the opposite is true, we should not let our distaste for "pirates" interfere with our interpretation of the copyright laws. I would therefore hold that, as to sound recordings fixed before February 15, 1972, the States may not enforce laws limiting reproduction.

UNITED STATES *v.* LITTLE LAKE MISERE LAND CO., INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71–1459. Argued January 15–16, 1973—Decided June 18, 1973

Pursuant to the Migratory Bird Conservation Act, the United States acquired land parcels in Louisiana for a wildlife refuge, one by deed in 1937, the other by condemnation in 1939. Mineral rights were reserved to the respondent former owners for a period of 10 years, subject to extension if certain detailed exploration and production conditions were met, after which complete fee title was to vest in the United States. The 10-year period expired without the extension conditions being met. Respondents continued to claim the mineral rights, relying on Louisiana Act 315 of 1940, which, as applied retroactively, provides that mineral rights reserved in land conveyances to the United States shall be "imprescriptible," thus, in effect, extending indefinitely the former owners' mineral reservations. The Government brought this suit to quiet title. The District Court entered summary judgment for the respondents, concluding that *Leiter Minerals, Inc.* v. *United States*, 329 F. 2d 85, was dispositive of the issues, notwithstanding that that judgment had been vacated by this Court and the case remanded with instructions to dismiss the complaint as moot. The Court of Appeals affirmed. *Held:* Under settled principles governing the choice of law by federal courts, Louisiana's Act 315 of 1940 does not apply to the mineral reservations agreed to by the parties in 1937 and 1939. Pp. 590–604.

(a) Here, where the land acquisition to which the United States is a party arises from and bears heavily upon a federal regulatory program, the choice-of-law task is a federal one for federal courts, as defined by *Clearfield Trust Co.* v. *United States*, 318 U. S. 363. Pp. 590–593.

(b) Absence of a provision dealing with choice of law in the Migratory Bird Conservation Act does not limit the reach of federal law, as interstitial federal lawmaking is a basic responsibility of the federal courts. P. 593.

(c) Even assuming that the established body of state property law should generally govern federal land acquisitions, Act 315,

as retroactively applied, may not, because in determining the appropriateness of "borrowing" state law, specific aberrant or hostile state rules do not provide appropriate standards for federal law. Under Act 315 land acquisitions explicitly authorized by federal statute are made subject to a rule of retroactive imprescriptibility, a rule plainly hostile to the United States, and one that deprives the United States of bargained-for contractual interests. Pp. 594–597.

(d) To permit state legislation to abrogate the explicit terms of a prior federal land acquisition would seriously impair federal statutory programs and the certainty and finality that are indispensable to land transactions. Pp. 597–599.

(e) Act 315, as applied retroactively, serves no legitimate and important state interests the fulfillment of which Congress might have contemplated through application of "borrowed" state law. Pp. 599–601.

(f) In 1937 and 1939, the Government could not anticipate that the mineral reservations in issue might be characterized, under present Louisiana law, as indefinite in duration and freely revocable. A late-crystallizing state law doctrine may not modify the clear and explicit contractual expectations of the United States. Pp. 602–603.

(g) As it is clear that Act 315 does not apply here, it is not necessary to choose between "borrowing" some residual state rule of interpretation or formulating an independent federal "common law" rule; neither rule is the law of Louisiana, yet either rule resolves this dispute in the Government's favor. Pp. 603–604.

453 F. 2d 360, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. STEWART, J., *post*, p. 605, and REHNQUIST, J., *post*, p. 606, filed opinions concurring in the judgment.

William Bradford Reynolds argued the cause for the United States. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Frizzell, Deputy Solicitor General Wallace,* and *Edmund B. Clark.*

Austin W. Lewis argued the cause for respondents. With him on the brief was *Gene W. Lafitte.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted the writ in this case to consider whether state law may retroactively abrogate the terms of written agreements made by the United States when it acquires land for public purposes explicitly authorized by Congress.

The United States initiated this litigation in 1969 in the United States District Court for the Western District of Louisiana, seeking to quiet title to two adjacent parcels of land in Cameron Parish, Louisiana, which the Government had acquired pursuant to the Migratory Bird Conservation Act, 45 Stat. 1222, 16 U. S. C. § 715 *et seq.*, as part of the Lacassine Wildlife Refuge.[1] Title to one parcel was acquired by the United States by purchase on July 23, 1937; to the other parcel by a judgment of condemnation entered August 30, 1939. Both the 1937 act of sale and the 1939 judgment of condemnation reserved to the respondent Little Lake Misere oil, gas, sulphur, and other minerals for a period of 10 years from the date of vesting of title in the United States.[2] The reser-

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[1] The United States brought two separate suits for this purpose under 28 U. S. C. § 1345, which were consolidated by consent pursuant to Fed. Rule Civ. Proc. 42 (a).

[2] In *Frost-Johnson Lumber Co.* v. *Salling's Heirs*, 150 La. 756, 91 So. 207 (1922), the Louisiana Supreme Court declined to recognize a perpetual "mineral estate" in Louisiana lands, transferable independently of the overlying surface property. Instead, the Louisiana Supreme Court declared that "oil and gas in place are not subject to absolute ownership as specific things apart from the soil of which they form part," *id.*, at 858, 91 So., at 243, and that sale or reservation of mineral rights affords no more than a right to go on the land to search for and reduce to possession all minerals found. 2 A. Yiannopoulos, Louisiana Civil Law Treatise, Property § 99 (1967); H. Daggett, Mineral Rights in Louisiana § 1 (Rev. ed. 1949). See generally Hardy, The Birth of Louisiana Mineral Law, 16 Loyola L. Rev. 299 (1970). Since *Frost-Johnson*, "[s]ale and

vation was to continue in effect "as long [after the initial ten-year period] as oil, gas, sulphur or other mineral is produced . . . or so long thereafter as [respondents] shall conduct drilling or reworking operations thereon with no cessation of more than sixty (60) days consecutively until production results; and, if production results, so long as such mineral is produced." The deed and the judgment of condemnation further recited that at the end of 10 years or at the end of any period after 10 years during which the above conditions had not been met, "the right to mine, produce and market said oil, gas, sulphur or other mineral shall terminate . . . and the complete fee title to said lands shall thereby become vested in the United States."

The parties stipulated, and the District Court found, that as to both the parcels in issue here, no drilling, reworking, or other operations were conducted and no minerals were obtained for a period of more than 10 years following the act of sale and judgment of condemnation, respectively. Thus, under the terms of these instruments, fee title in the United States ripened as of 1947 and 1949, respectively—10 years from the dates of crea-

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reservation of mineral rights have been almost consistently classified as servitudes." Yiannopoulos, *supra*, § 62, at 183; Daggett, *supra*, § 2.

"Prescription" or expiration of the remedy to protect a mineral servitude will occur at the end of 10 years from the date of creation, if the servitude is not maintained during that time in accordance with complex requirements for use or acknowledgment. The parties may not extend the 10-year period of prescription by advance agreement, see Art. 3460, La. Civ. Code Ann.; *Hightower* v. *Maritzky*, 194 La. 998, 1006–1007, 195 So. 518, 520–521 (1940). However, the parties are not barred from agreeing to a period of contractual prescription shorter than 10 years. Nabors, The Louisiana Mineral Servitude and Royalty Doctrines: A Report to the Mineral Law Committee of the Louisiana State Law Institute, 25 Tul. L. Rev. 155, 176–177 (1951).

tion. In 1955, the United States issued oil and gas leases applicable to the lands in question.

Respondents, however, continued to claim the mineral rights and accordingly entered various transactions purporting to dispose of those rights. Respondents relied upon Louisiana Act 315 of 1940, La. Rev. Stat. § 9:5806 A (Supp. 1973), which provides:

> "When land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies from any person, firm or corporation, and by the act of acquisition, order or judgment, oil, gas or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas or other minerals or royalties, still in force and effect, the rights so reserved or previously sold shall be imprescriptible."

Respondents contended that the 1940 enactment rendered inoperative the conditions set forth in 1937 and 1939 for the extinguishment of the reservations. The District Court concluded that the Court of Appeals' prior decision in *Leiter Minerals, Inc.* v. *United States*, 329 F. 2d 85 (CA5 1964), required resolution of this case in favor of respondents, notwithstanding that we had vacated the Court of Appeals' judgment in *Leiter Minerals* and remanded with instructions to dismiss the complaint as moot. 381 U. S. 413 (1965). The Court of Appeals affirmed, for the reasons stated in its *Leiter Minerals* holding. It rejected the Government's Contract Clause and Supremacy Clause objections on the authority of *United States* v. *Nebo Oil Co.*, 190 F. 2d 1003 (CA5 1951), and further rejected the Government's argument that Act 315 was unconstitutionally discriminatory against the United States. The Court of Appeals

observed "that the same principle applies to acquisitions by the State of Louisiana [La. Rev. Stat. § 9:5806 B], and that the act really does nothing more than place citizens of Louisiana in the same position as citizens of other states whose land has been purchased or condemned by the United States." 453 F. 2d 360, 362 (1971). We reverse.

I

Litigation involving Act 315 began more than a quarter century ago. The *Leiter Minerals* case, upon which the Court of Appeals based its decision in this case, is only the principal holding in the area. The first case to arise involving Act 315, *Whitney Nat. Bank* v. *Little Creek Oil Co.*, grew out of a 1932 sale of mineral rights that specified a 10-year period of prescription. The surface property was conveyed to the United States in 1936, subject to the 1932 mineral sale, and in 1947 the question arose whether Act 315 of 1940 had the effect of extending indefinitely the servitude created by the 1932 sale. The Louisiana Supreme Court held that Act 315 of 1940 was fully applicable to the 1936 transaction—"not because there is anything in the terms of the statute to indicate that it was intended to have a retroactive application, but because of the general rule of law established by the jurisprudence of this court that laws of prescription and those limiting the time within which actions may be brought are retrospective in their operation." 212 La. 949, 958, 33 So. 2d 693, 696 (1947).[3] The court acknowledged the contention that if

[3] Louisiana law distinguishes between prescription and "peremption." The Louisiana Supreme Court has explained the distinction in the following terms: "'When a statute creates a right of action, and stipulates the delay within which that right is to be executed, the delay thus fixed is not, properly speaking, one of *prescription*, but it is one of *peremption*. Statutes of prescription simply bar the

Act 315 were applied retroactively, it might be unconstitutional, but dismissed the constitutional issue without resolving it for failure to join the United States, a necessary party.

Whitney Bank set the stage for the first federal court test of Act 315, as construed to have retroactive application, in *United States* v. *Nebo Oil Co., supra,* aff'g 90 F. Supp. 73 (WD La. 1950). There the United States brought suit against Nebo Oil (the successor to the 1932 mineral purchaser of the *Whitney Bank* case) to secure a declaratory judgment that the United States owned the acreage it purchased in 1936 subject only to the 10-year rule of prescription specified at the time of the original 1932 sale of mineral rights. But the Court of Appeals upheld the application of Act 315 to the previously consummated transaction, stressing that reversionary estates are unknown in Louisiana law and that, as a result, the United States in 1936 took "nothing more than a mere expectation, or hope, based upon an anticipated continuance of the applicable general laws . . . . [This] mere expectancy . . . cannot be regarded as a vested right protected by the Constitution." 190 F. 2d, at 1008–1009.[4]

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remedy. Statutes of peremption destroy the cause of action itself. That is to say, after the limit of time expires the cause of action no longer exists; it is lost.'" *Brister* v. *Wray Dickinson Co., Inc.,* 183 La. 562, 565, 164 So. 415, 416 (1935), cited in *United States* v. *Nebo Oil Co.,* 90 F. Supp. 73, 80 (WD La. 1950). Because statutes of prescription are considered "remedial" the Louisiana courts have generally held that such statutes are applicable to causes of action which arose before the statute was enacted. *United States* v. *Nebo Oil Co., supra,* at 81–82, and cases cited.

[4] The Court of Appeals also emphasized that officials of the Department of Agriculture had represented to the Government's vendor that "the prescriptive provisions of the Louisiana Civil Code would not apply to lands sold to the United States for national forest purposes." 190 F. 2d 1003, 1005. The Court of Appeals noted that the

In the *Leiter Minerals* litigation, retrospective application of Act 315 to a detailed, conditional mineral reservation was in issue for the first time. Leiter Minerals, Inc., succeeded to the interests of the Leiter family, which in 1938 had sold a substantial tract in Plaquemines Parish, Louisiana, to the United States. Leiter's federal sale was subject to a mineral reservation in Leiter's favor, providing in essence that the reservation would be extended for five years beyond its initial 10-year duration whenever commercially advantageous mineral extraction had occurred during 50 days of a defined period.[5] At the expiration of any period during which the conditions for extension had not been met, the right to mine would terminate "and complete fee in the land becomes vested in the United States." The mineral reservation expired by its own terms; the Government granted a valuable mineral lease; and Leiter invoked Act 315 to support its claim to a servitude of continuing duration.

After a false start in the Louisiana courts, the ensuing litigation found its way into a federal forum. The United States sued in the Eastern District of Louisiana to quiet title and to enjoin the concurrent state court proceedings initiated by Leiter. The Court of Appeals affirmed an injunction granted by the District

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price paid by the Government did not reflect the value of any mineral rights and that the vendor would not have agreed to the land sale absent the Government's representation that Louisiana prescriptive law would not apply. *Id.*, at 1006.

[5] The initial duration of the reservation was 10 years. If mineral operations took place for "an average of at least 50 days per year" during the final three years of the specified term, the servitude would be extended for an additional five-year period, but only with respect to "an area of twenty-five acres of land" around each well or mine producing or being drilled at the "time of first extension." Additional five-year extensions could be obtained "from time to time" to permit completion of active drilling operations.

Court,[6] and this Court agreed, but remanded to the Court of Appeals with instructions to secure an authoritative construction of Act 315 before proceeding to the difficult constitutional issues in the case. *Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220, 229 (1957).[7]

Adhering to the terms of the remand, Leiter sought a declaratory judgment in the Louisiana courts, which expressed some continuing doubt over the breadth of their responsibility for resolving the *Leiter* controversy on its own facts. Ultimately, the Louisiana Supreme Court took jurisdiction of the case and rendered a declaratory judgment limited to general elucidation of Act 315, without applying the Act to the specific terms of the Leiter mineral reservation itself. *Leiter Minerals, Inc.* v. *California Co.*, 241 La. 915, 132 So. 2d 845 (1961). The Louisiana Supreme Court expressed its conclusions as follows:

> "First, that if the reservation in the Leiter deed is construed as establishing a mineral servitude for a definite, fixed, and specified time which has elapsed, then Act 315 of 1940 is not applicable and cannot be constitutionally applied; and second, that if the reservation is construed as not establishing a servitude for a fixed, definite and certain time, and if

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[6] *Leiter Minerals, Inc.* v. *United States*, 224 F. 2d 381 (CA5 1955), aff'g 127 F. Supp. 439 (ED La. 1954).

[7] The 1957 remand was in effect a remand with instructions to abstain. It contemplated state court elucidation of various uncertainties surrounding Act 315, before this Court would attempt "to decide their relation to the issues in the case." We do not, therefore, understand the respondents' suggestion, echoed by MR. JUSTICE STEWART, that the 1957 remand foreshadowed final resolution of the *Leiter Minerals* controversy through state law. Indeed, the Court's opinion stated that "[i]t need hardly be added that the state courts . . . can decide definitively only questions of state law that are not subject to overriding federal law." 352 U. S. 220, 229–230.

> it is decided that the provisions of the reservation show that the parties were stipulating for a period of contractual prescription for the conditional extinguishment of the mineral servitude created, then Act 315 of 1940 is applicable and constitutional." *Id.*, at 942, 132 So. 2d, at 854–855.

Recognizing that "the interpretation of this reservation is for the United States courts, and not for us in this proceeding," *id.*, at 930, 132 So. 2d, at 850, that court nevertheless hinted broadly that it viewed the Leiter reservation as one establishing a reservation for an indefinite period of time, and thus one subject to retroactive application of Act 315. See *id.*, at 936, 938, 132 So. 2d, at 852, 853.

The parties then returned to federal court. The District Court held that the mineral reservation in the Leiter deed created a mineral servitude for a fixed period and that, under the terms of the Louisiana Supreme Court's declaratory ruling, as a matter of state law the reservation was not affected by Act 315. 204 F. Supp. 560 (ED La. 1962). The Court of Appeals reversed. It rejected the Government's contention that federal law controlled the rights of the United States under the reservation, and held, instead, that those rights were to be governed by Louisiana law. The Court of Appeals believed that the Louisiana Supreme Court had viewed Leiter's servitude as "one of indefinite duration" and it agreed with that view. Under Louisiana law, therefore, the reservation "provide[d] for a contractual prescription for the conditional extinguishment of the mineral servitude which was rendered inoperative by [Act 315]." 329 F. 2d, at 93. As to the Government's contention that the Act, as so construed, unconstitutionally impaired the obligation of contract, the Court of Appeals concluded that the dis-

cussion of that matter in its prior decision in *Nebo Oil*, *supra*, and in the Louisiana Supreme Court's *Leiter* opinion, made it "unnecessary further to labor" the point. *Id.*, at 94. Judge Gewin dissented. On being advised by the parties that the case had been settled, we granted certiorari, vacated the judgment of the Court of Appeals, and remanded the cause to the District Court with instructions to dismiss the complaint as moot. 381 U. S. 413 (1965).

II

The essential premise of the Court of Appeals' decision in the *Leiter Minerals* case was that state law governs the interpretation of a federal land acquisition authorized by the Migratory Bird Conservation Act. The Court of Appeals did not set forth in detail the basis for this premise,[8] but that court's opinion seems to say

[8] In *Leiter Minerals*, the Court of Appeals stated that, although "Congress could make federal law applicable, . . . it had no intention to do so when it merely authorized the contract by which the United States acquired the [Leiter] property." The Court of Appeals expressed the view that "[s]tate law must govern in the absence of a federal statute," and in support of its view it cited *Swift* v. *Tyson*, 16 Pet. 1, 18 (1842). Later in its opinion, the Court of Appeals stated that "since the United States had the right to invoke federal jurisdiction (28 U. S. C. § 1345), the ultimate responsibility for the interpretation of the reservation rests upon the federal courts. That interpretation, however, must be in accordance with State law . . . ." 329 F. 2d 85, 90, 91. From these statements, it appears that the Court of Appeals considered that the interpretation of the *Leiter* agreement was governed by state law (applied of its own force), with the role of the federal courts confined to interpretation of state law "in accordance with State law" as laid down by the highest courts of the State. Possibly, though, the Court of Appeals thought that the choice of applicable law was itself a question of federal law ("ultimate responsibility . . . rests upon the federal courts . . .") but that in the general context of this case, involving real property, state law should be applied through "borrowing."

that state law governs this land acquisition because, at bottom, it is an "ordinary" "local" land transaction to which the United States happens to be a party. The suggestion is that this Court's decision in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938), compels application of state law here because the Rules of Decisions Act, 28 U. S. C. § 1652,[9] requires application of state law in the absence of an explicit congressional command to the contrary. We disagree.

The federal jurisdictional grant over suits brought by the United States is not in itself a mandate for applying federal law in all circumstances. This principle follows from *Erie* itself, where, although the federal courts had jurisdiction over diversity cases, we held that the federal courts did not possess the power to develop a concomitant body of general federal law. Mishkin, The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797, 799 (1957). It is true, too, that "[t]he great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state." *Davies Warehouse Co.* v. *Bowles,* 321 U. S. 144, 155 (1944). Even when federal general law was in its heyday, an exception was carved out for local laws of real property. *Swift* v. *Tyson,* 16 Pet. 1, 18 (1842); see *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349, 360 (1910). Indeed, before *Erie R. Co.* v. *Tompkins, supra,* this Court's opinions left open the possibility that even "the United States, while protected by the Constitution from

[9] "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

discriminatory state action, and perhaps certain other special forms of state control, was nevertheless governed generally in its ordinary proprietary relations by state law." Hart, The Relations Between State and Federal Law, 54 Col. L. Rev. 489, 533 (1954). See, *e. g.*, *Mason* v. *United States*, 260 U. S. 545, 558 (1923).

Despite this arguable basis for its reasoning the Court of Appeals in the instant case seems not to have recognized that this land acquisition, like that in *Leiter Minerals*, is one arising from and bearing heavily upon a federal regulatory program. Here, the choice-of-law task is a federal task for federal courts, as defined by *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943). Since *Erie*, and as a corollary of that decision, we have consistently acted on the assumption that dealings which may be "ordinary" or "local" as between private citizens raise serious questions of national sovereignty when they arise in the context of a specific constitutional or statutory provision; particularly is this so when transactions undertaken by the Federal Government are involved, as in this case.[10] In such cases, the Constitution or Acts of

[10] This is not a case where the United States seeks to oust state substantive law on the basis of "an amorphous doctrine of national sovereignty" divorced from any specific constitutional or statutory provision and premised solely on the argument "that every authorized activity of the United States represents an exercise of its governmental power," see *United States* v. *Burnison*, 339 U. S. 87, 91 and 92 (1950); *United States* v. *Fox*, 94 U. S. 315 (1877). *Burnison* and *Fox* stand at the opposite end of the spectrum from cases where Congress explicitly displaces state law in the course of exercising clear constitutional regulatory power over a particular subject matter. See, *e. g.*, *Sunderland* v. *United States*, 266 U. S. 226, 232–233 (1924) (United States may displace Oklahoma law by imposing restrictions on alienation of Indian property despite the "general rule . . . that the tenure, transfer, control and disposition of real property are matters which rest exclusively with the State where the property lies"). The present case falls between the poles

Congress "require" otherwise than that state law govern of its own force.

There will often be no specific federal legislation governing a particular transaction to which the United States is a party; here, for example, no provision of the Migratory Bird Conservation Act guides us to choose state or federal law in interpreting federal land acquisition agreements under the Act. But silence on that score in federal legislation is no reason for limiting the reach of federal law, as the Court of Appeals thought in *Leiter Minerals*. To the contrary, the inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts. "At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or 'judicial legislation,' rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress. In other words, it must mean recognition of federal judicial competence to declare the governing law in an area comprising issues substantially related to an established program of government operation." Mishkin, 105 U. Pa. L. Rev., at 800.

This, then, is what has aptly been described as the "first" of the two holdings of *Clearfield Trust Co.* v. *United States, supra*—that the right of the United States to seek legal redress for duly authorized proprietary transactions "is a federal right, so that the courts of the United States may formulate a rule of decision." Friendly, In Praise of *Erie*—And of the New Federal Common Law, 39 N. Y. U. L. Rev. 383, 410 (1964). At

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of *Burnison* and *Sunderland*. Here we deal with an unquestionably appropriate and specific exercise of congressional regulatory power which fails to specify whether or to what extent it contemplates displacement of state law.

least this first step of the *Clearfield* analysis is applicable here. We deal with the interpretation of a land acquisition agreement (a) explicitly authorized, though not precisely governed, by the Migratory Bird Conservation Act and (b) to which the United States itself is a party. Cf. *Bank of America* v. *Parnell*, 352 U. S. 29, 33 (1956). As in *Clearfield* and its progeny, "[t]he duties imposed upon the United States and the rights acquired by it . . . find their roots in the same federal sources. . . . In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards." 318 U. S., at 366–367; *United States* v. *Allegheny County*, 322 U. S. 174, 183 (1944); *United States* v. *Standard Oil Co.*, 332 U. S. 301, 305 (1947); *Board of County Comm'rs* v. *United States*, 308 U. S. 343, 349–350 (1939).[11]

III

The next step in our analysis is to determine whether the 1937 and 1939 land acquisition agreements in issue should be interpreted according to "borrowed" state law—Act 315 of 1940. The availability of this choice was explicitly recognized in *Clearfield Trust* itself [12] and fully elaborated some years later in *United States* v. *Standard Oil Co., supra.* There we acknowledged that "in many situations, and apart from any supposed influence of the *Erie* decision, rights, interests and legal relations of the United States are determined by application of state law, where Congress has not acted specifically." 332 U. S., at

[11] *United States* v. *Certain Property*, 306 F. 2d 439 (CA2 1962), the principal decision relied on by the Court of Appeals in *Leiter Minerals, supra,* does not suggest application of state law, of its own force, to federal land acquisitions. See the discussion by the author of *Certain Property* in Friendly, 39 N. Y. U. L. Rev., at 411 n. 133.

[12] "In our choice of the applicable federal rule we have occasionally selected state law." 318 U. S., at 367.

308. We went on to observe that whether state law is to be applied is a question "of federal policy, affecting not merely the federal judicial establishment and the groundings of its action, but also the Government's legal interests and relations, a factor not controlling in the types of cases producing and governed by the *Erie* ruling. And the answer to be given necessarily is dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law." *Id.*, at 309–310. See also *De Sylva* v. *Ballentine*, 351 U. S. 570, 580 (1956); *RFC* v. *Beaver County*, 328 U. S. 204 (1946); *Board of County Comm'rs* v. *United States*, 308 U. S., at 351–352; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 296 (1941); *United States* v. *Yazell*, 382 U. S. 341, 356–357 (1966); cf. *United States* v. *Mitchell*, 403 U. S. 190 (1971).

The Government urges us to decide, virtually without qualification, that land acquisition agreements of the United States should be governed by federally created federal law. Cf. *United States* v. *93.970 Acres*, 360 U. S. 328 (1959). We find it unnecessary to resolve this case on such broad terms. For even if it be assumed that the established body of state property law should generally govern federal land acquisitions, we are persuaded that the particular rule of law before us today—Louisiana's Act 315 of 1940, as retroactively applied—may not. The "reasons which may make state law at times the appropriate federal rule are singularly inappropriate here." *Clearfield Trust*, 318 U. S., at 367.[13]

The Court in the past has been careful to state that, even assuming in general terms the appropriateness of

[13] In view of our disposition, we decline to resolve the continuing uncertainty, under Louisiana law, over the applicability of Act 315 to the mineral reservation in issue here. See *infra*, at 601–602.

"borrowing" state law, specific aberrant or hostile state rules do not provide appropriate standards for federal law. In *De Sylva* v. *Ballentine, supra,* we held that whether an illegitimate child was a "child" of the author entitled under the Copyright Act to renew the author's copyright was to be determined by whether, under state law, the child would be an heir of the author. But Mr. Justice Harlan's opinion for the Court took pains to caution that the Court's holding "does not mean that a State would be entitled to use the word 'children' in a way entirely strange to those familiar with its ordinary usage . . . ." 351 U. S., at 581. In *RFC* v. *Beaver County, supra,* the issue was whether the definition of "real property," owned by the RFC and authorized by Congress to be subject to state and local taxation, was to be derived from state law or to be fashioned as an independent body of federal law. The Court concluded that "the congressional purpose can best be accomplished by application of settled state rules as to what constitutes 'real property' "—but again the Court foresaw that its approach would be acceptable only "so long as it is plain, as it is here, that the state rules do not effect a discrimination against the Government, or patently run counter to the terms of the Act." 328 U. S., at 210. See also *U. A. W.* v. *Hoosier Cardinal Corp.,* 383 U. S. 696, 706 (1966).

Under Louisiana's Act 315, land acquisitions of the United States,[14] explicitly authorized by the Migratory

[14] In 1938, the Louisiana Legislature passed Act 68 and, later, Act 151. Both statutes barred prescription of mineral reservations in certain lands conveyed to the United States. Act 68 applied to land acquired by the United States or by the State of Louisiana "for use in the construction, operation or maintenance of any spillway or floodway" authorized by federal law. Act 151, broad enough in terms to supersede Act 68, provided that prescription would not run against mineral or royalty reservations or real estate "acquired

Bird Conservation Act, are made subject to a rule of retroactive imprescriptibility, a rule that is plainly hostile to the interests of the United States. As applied to a consummated land transaction under a contract which specifically defined conditions for prolonging the vendor's mineral reservation, retroactive application of Act 315 to the United States deprives it of bargained-for contractual interests.

To permit state abrogation of the explicit terms of a federal land acquisition would deal a serious blow to the congressional scheme contemplated by the Migratory Bird Conservation Act and indeed all other federal land acquisition programs. These programs are national in scope. They anticipate acute and active bargaining by officials of the United States charged with making the best possible use of limited federal conservation appropriations. Certainty and finality are indispensable in any land transaction, but they are especially critical when, as here, the federal officials carrying out the mandate of Congress irrevocably commit scarce funds.

The legislative history of the Migratory Bird Conservation Act confirms the importance of contractual certainty to the federal land acquisition program it authorizes. As originally enacted in 1929, the Act provided that land acquisitions might include reservations, ease-

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by the United States of America, the State of Louisiana, or any of its subdivisions . . . for use in any public work and/or improvement." See generally Comment, Imprescriptible Mineral Reservations in Sales of Land to the State and Federal Governments, 22 Tul. L. Rev. 496 (1948).

Whether because the "floodway" and "public work" qualifications of the 1938 Acts make them inapplicable to the 1939 condemnation reservation in issue here, or because the parties' own agreement in 1939 reflects their belief that Act 151 was inapplicable, respondents do not argue that the 1938 legislation is material to the outcome of this case.

ments, and rights of way but that these were to be subject to "such rules and regulations" as the Secretary of Agriculture might prescribe "from time to time." § 6, 45 Stat. 1223. This sweeping statement of the Secretary's power to modify contract terms in favor of the Government had an unsettling effect on potential vendors; in 1935, the Act was amended to require the Secretary either to include his rules or regulations in the contract itself or to state in the contract that the reservation or easement would be subject to rules and regulations promulgated "from time to time." [15] A Congress solicitous of the interests of private vendors

[15] See S. Rep. No. 822, 74th Cong., 1st Sess., Report of the Special Committee on Conservation of Wildlife Resources on S. 3006, pp. 2–3 (1935):

"The Migratory Bird Conservation Act of 1929 established the Federal policy for the acquisition of areas for migratory waterfowl refuges. Under the provisions of that act, the Secretary of Agriculture was authorized when purchasing property for waterfowl refuges, to make certain reservations to be retained by the vendors of the property, but these reservations were subjected to regulations of the Secretary of Agriculture which might be made 'from time to time.' The administration of this act has developed some harassments in the acquisition of desirable waterfowl areas because some owners are not willing to convey their lands to the Federal Government on the indefinite and uncertain terms as provided in regulations made 'from time to time.'

"Obviously they may well be justified in their view, and, just as obviously, the Government may reasonably be secured in its interests by providing for enjoyment on the reservations under regulations to be stated in the conveyance at the time of its execution, leaving the vendor who has made the reservation to the general requirement of existing law that he will be subject to the rules and regulations of the Secretary of Agriculture governing the general administration of the area as a migratory bird refuge.

"Accordingly it is proposed to amend section 6 of the act of 1929 so that these reservations, in the discretion of the Secretary of Agriculture, may be subjected to regulations to be stated in the instrument of conveyance."

in the certainty of contract would hardly condone state modification of the contractual terms specified by the United States itself as vendee, whether or not those terms may be characterized as "rules and regulations" within the meaning of the Act.

Conceivably, our conclusion might be influenced if Louisiana's Act 315 of 1940, as applied retroactively, served legitimate and important state interests the fulfillment of which Congress might have contemplated through application of state law. But that is not the case. We do not deprecate Louisiana's concern with facilitating federal land acquisitions by removing uncertainty on the part of reluctant vendors over the duration of mineral reservations retained by them. From all appearances, this concern was a significant force behind the enactment of the 1940 legislation.[16] But today we are not asked to consider Act 315 on its face, or as applied to transactions consummated after 1940; we are concerned with the application of Act 315 to a pair of acquisition agreements in 1937 and 1939. And however legitimate the State's interest in facilitating federal land acquisitions, that interest has no application to transactions already completed at the time of the enactment of Act 315: the legislature cannot "facilitate" transactions already consummated.[17]

The Louisiana Supreme Court has candidly acknowledged two additional purposes which help to explain retroactive application of Act 315: to clarify the taxa-

[16] See the discussion in *Leiter Minerals, Inc.* v. *California Co.*, 241 La. 915, 932, 132 So. 2d 845, 851 (1961).

[17] Because we are concerned here with retroactive application of Act 315, there is likewise no basis for the Court of Appeals' suggestion that Act 315 simply places Louisiana citizens on the same footing as other States' citizens whose land is purchased or condemned by the United States.

bility by the State of mineral interests in the large federal land holdings in Louisiana, otherwise in doubt by virtue of the arcane and fluctuating doctrines of intergovernmental tax immunity; and to ensure that federal mineral interests could be subjected to state mineral conservation laws without federal pre-emption.[18] We are not unsympathetic to Louisiana's concern for the consequences of a continuing, substantial, even if contingent, federal interest in Louisiana minerals. Congress, however, could scarcely have viewed that concern as a proper justification for retroactive application of state legislation which effectively deprives the Government of its bargained-for contractual interests. Our Federal Union is a complicated organism, but its legal processes cannot legitimately be simplified through the inviting expedient

[18] "There can be no doubt . . . that there were other objects and purposes for the enactment of Act 315 of 1940 . . . .

"One of the important sources of revenue of the State of Louisiana is the severance tax which is levied and collected by the state when natural resources such as oil and gas are produced and extracted from the land. If the mineral rights were owned by the federal government in lands which the government had purchased, the mineral owner's share of the oil and gas produced from these lands would not be subject to taxation by the State of Louisiana, and the state would be deprived of large sums in taxes, especially since an immense area is owned by the federal government in oil-producing sections of this state, as the very facts of this case disclose.

"Moreover, the State of Louisiana in the exercise of its police power has authority to protect, conserve, and replenish the natural resources of the state and to prohibit and prevent their waste. . . . Under this power the Legislature has adopted laws regulating and controlling the production of oil and gas within the state. By making mineral rights imprescriptible in lands sold to the government and retaining these rights in the vendors, Act 315 of 1940 avoided a possible conflict by the state in the exercise of its police power with the federal government." 241 La., at 933–934, 132 So. 2d, at 851–852.

of special legislation which has the effect of confiscating interests of the United States.[19]

Respondents point out that "[o]ne who owns land subject to an outstanding mineral reservation possesses no vested property interest [under Louisiana law], inasmuch as 'estates in reversion' are unknown to Louisiana law. Such an owner of the land possesses only a hope or expectancy to acquire these mineral rights; and . . . this hope or expectancy is not an object that can be legally sold." Brief for Respondents 27, citing, *e. g.*, *Hicks* v. *Clark*, 225 La. 133, 72 So. 2d 322 (1954). But whether Louisiana recognizes the interests at stake here as transferable interests in real property, as such, has

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[19] In 1958, 18 years after the passage of Act 315, Louisiana enacted legislation that subjects the State and certain of its subdivisions to the rule of imprescriptibility. Louisiana Act 278 of 1958, La. Rev. Stat. § 9:5806 B (Supp. 1973). But this belated effort at statutory parity does not eliminate the adverse effect upon the United States, and upon the Migratory Bird Conservation Act, of retroactive application of Act 315 of 1940. For one thing, it is not clear whether the 1958 legislation will be given full retrospective effect by the Louisiana courts, reaching back to 1937 and earlier. More basic, even assuming retrospective application of the 1958 statute, the effect of the 1958 statute on Louisiana is not comparable to the effect of the 1940 Act on the United States. With or without legislation relating to prescription of mineral interests tied to governmental land acquisitions, Louisiana could plainly apply its own conservation laws and its own severance tax to any property in which the State held a contingent or even a present mineral interest. The 1958 legislation did nothing to reduce Louisiana's freedom in this respect. Act 315 of 1940, however, as applied retroactively, had the avowed purpose and would have the clear effect of permitting taxation and conservation regulation of minerals which, quite possibly, would otherwise fall within the Federal Government's exclusive domain. However parallel the two statutes in purpose and in their potential effect on actual mineral right ownership by the respective sovereigns, it is only Act 315 of 1940 that significantly affects interests of the United States in intergovernmental immunity.

no bearing on our conclusion that after-the-fact modification of explicit contractual terms would be adverse to the United States and contrary to the requirements of the Migratory Bird Conservation Act.

It is also of no import that, under Louisiana law as it might be articulated in 1973, the United States acquired from respondents only the reversion to a mineral interest of indefinite duration, a "hope" or "expectancy" revocable at any time by after-enacted legislation. Respondents place heavy reliance on the opinion of the Louisiana Supreme Court in *Leiter Minerals,* where that court held that a mineral reservation for an indefinite duration was one traditionally subject to retroactive prescriptive change. But even if this rule of law could have been anticipated in 1937 and 1939, when the United States agreed to the mineral reservations in issue here, that the 1937 and 1939 reservations were of "indefinite" duration could not have been. Indeed, some 20 years later, in 1957, when *Leiter Minerals* came to this Court for the first time, we were not in a position to resolve the Government's contention that the *Leiter* reservation was one of specific duration. Uncertainty over this question of Louisiana law was the guiding force behind our remand in hopes of obtaining the view of the Louisiana Supreme Court. In its advisory opinion, the Louisiana Supreme Court did not decide whether the *Leiter*-type reservation was "indefinite" and subject to retroactive modification—to the extent that the Federal District Court, in Louisiana, subsequently concluded that the servitude in the *Leiter* reservation was not, under state law, freely revocable. In *Leiter Minerals,* one Court of Appeals judge dissented on this state law issue, and, with reason, the Government renews the issue before the Court in this case.

Were the terms of the mineral reservations at issue here less detailed and specific, it might be said that the

Government acknowledged and intended to be bound by unforeseeable changes in state law. But the mineral reservations before us are flatly inconsistent with the respondents' suggestion that the United States in fact expected that these reservations would be wholly subject to retroactive modification. Nor, given the absence of any reliable contemporaneous Louisiana signpost and the absence even today of any final resolution of the pertinent state law question, can we say that the United States ought to have anticipated that its deed contained an empty promise. Respondents' reliance on the Louisiana Supreme Court's holding in its opinion in 1961 in *Leiter Minerals* assumes that a late-crystallizing doctrine of state law is appropriately applied to modify the expectations of the United States established by the terms of 1937 and 1939 bargains. The argument, however, is indistinguishable from respondents' defense of Act 315 itself. Years after the fact, state law may not redefine federal contract terminology "in a way entirely strange to those familiar with its ordinary usage . . . ." *De Sylva* v. *Ballentine,* 351 U. S., at 581.

IV

In speaking of the choice of law to be applied, the alternatives are plain although in this case identifying them in fixed categories is somewhat elusive. One "choice" would be to apply the law urged on us by respondents, *i. e.,* Louisiana Act 315 of 1940. In some circumstances, such as those suggested by *RFC* v. *Beaver County,* 328 U. S. 204 (1946), or *Wallis* v. *Pan American Petroleum Corp.,* 384 U. S. 63 (1966),[20] state law may be found an acceptable choice, possibly even

[20] *Wallis* is readily distinguishable from the instant case; there the assignability of an oil and gas lease was in controversy between two private parties. That presented "no significant threat to any identifiable federal policy or interest." 384 U. S. 63, 68.

when the United States itself is a contracting party. However, in a setting in which the rights of the United States are at issue in a contract to which it is a party and "the issue's outcome bears some relationship to a federal program, no rule may be applied which would not be wholly in accord with that program." Mishkin, 105 U. Pa. L. Rev., at 805–806.

Since Act 315 is plainly not in accord with the federal program implemented by the 1937 and 1939 land acquisitions, state law is not a permissible choice here. The choice of law merges with the constitutional demands of controlling federal legislation; we turn away from state law by default. Once it is clear that Act 315 has no application here, we need not choose between "borrowing" some residual state rule of interpretation or formulating an independent federal "common law" rule; neither rule is the law of Louisiana yet either rule resolves this dispute in the Government's favor. The contract itself is unequivocal; the District Court concluded, and it is not disputed here, that by the clear and explicit terms of the contract reservations, "[respondents'] interests in the oil, gas, sulphur and other minerals terminated . . . no later than July 23, 1947, and August 30, 1949, unless Act 315 of 1940 has caused the reservations of the servitudes in favor of [respondents] to be imprescriptible."

We hold that, under settled principles governing the choice of law by federal courts, Louisiana's Act 315 of 1940 has no application to the mineral reservations agreed to by the United States and respondents in 1937 and 1939, and that, as a result, any contract interests of respondents expired on the dates identified by the District Court. Accordingly, we reverse the judgment of the Court of Appeals and remand the case for entry of an order consistent with this opinion.

Reversed and remanded.

MR. JUSTICE STEWART, concurring in the judgment.

I cannot agree with the Court that the mineral reservations agreed to by the United States and the respondents in 1937 and 1939 are governed by some brooding omnipresence labeled federal common law. It seems clear to me, as a matter of law, not a matter of "choice" or "borrowing," that when anyone, including the Federal Government, goes into a State and acquires real property, the nature and extent of the rights created are to be determined, in the absence of a specifically applicable federal statute, by the law of the State.

That was the very premise of the decision in *Leiter Minerals, Inc.* v. *United States,* 352 U. S. 220, 228–230 (1957), which remanded the case to the Court of Appeals with instructions to secure an authoritative construction of the *state* statute by the *state* courts, in order possibly to avoid deciding the federal constitutional issues. Other decisions of this Court lead to the same conclusion. *United States* v. *Yazell,* 382 U. S. 341, 352–358 (1966); *United States* v. *Burnison,* 339 U. S. 87, 89 (1950); *Davies Warehouse Co.* v. *Bowles,* 321 U. S. 144, 155 (1944); *Sunderland* v. *United States,* 266 U. S. 226, 232–233 (1924); *Mason* v. *United States,* 260 U. S. 545, 557–558 (1923); *United States* v. *Fox,* 94 U. S. 315, 320 (1877). Cf. *Wallis* v. *Pan American Petroleum Corp.,* 384 U. S. 63 (1966).

Since I think the Government's property acquisitions here are controlled by state law, the decisive question for me is whether the retroactive application of Louisiana Act 315 of 1940 to those acquisitions is constitutional.[1] The 1937 deed of purchase and the 1939 condemnation judg-

[1] Thus, I do not suggest, as the Court seems to think I do (*ante,* at 588 n. 7), that this controversy can necessarily be *finally* resolved through state law. Rather, my analysis is wholly consistent with the statement in *Leiter Minerals, Inc.* v. *United States,* 352 U. S. 220, 229–230 (1957), quoted by the Court today (*ante,* at 588 n. 7), that

ment were unequivocal: the mineral rights were reserved to the former owners of the land for a 10-year period, after which time—if certain conditions regarding exploration and production were not met—the reserved rights were to terminate, and complete fee title to the land, including the mineral rights, was to become vested in the United States. The Federal Government bargained for this contingent future interest in the minerals; it was clearly agreed to in the conveyances, and was thus reflected in the consideration paid by the Government to the former owners.

Yet the Court of Appeals held that Louisiana Act 315, which was enacted subsequent to those conveyances, operated to abrogate the agreed-upon terms of the mineral reservations by eliminating the Government's future interest. This retroactive application of Act 315, I believe, is a textbook example of a violation of Art. I, § 10, cl. 1, of the Constitution, which provides that no State shall pass any law "impairing the Obligation of Contracts." [2]

Accordingly, I concur in the judgment of the Court.

MR. JUSTICE REHNQUIST, concurring in the judgment.

I agree with my BROTHER STEWART that the central question presented by this case is whether Louisiana has the constitutional power to make Act 315 applicable to this transaction, and not whether a judicially created rule of decision, labeled federal common law, should

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state courts "can decide definitively only questions of state law that are not subject to overriding federal law."

[2] This case is a far cry from *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398 (1934), which upheld, in the face of a challenge based on the Contract Clause, emergency state legislation enacted to cope with the extraordinary economic depression existing in 1934. The retroactive application of Louisiana Act 315 serves no such paramount state interest. Cf. *City of El Paso* v. *Simmons*, 379 U. S. 497 (1965).

displace state law. The Migratory Bird Conservation Act does not establish a federal rule controlling the rights of the United States under the reservation. Whether Congress could enact such a provision is a question not now before us. In *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, 366 (1943), this Court held that federal common law governed the rights and duties of the United States "on commercial paper which it issues . . . ." The interest in having those rights governed by a rule which is uniform across the Nation was the basis of that decision. But the interest of the Federal Government in having real property acquisitions that it makes in the States pursuant to a particular federal program governed by a similarly uniform rule is too tenuous to invoke the *Clearfield* principle, especially in light of the consistent statements by this Court that state law governs real property transactions.

What for my Brother STEWART, however, is a "textbook example" of a violation of the Obligation of Contracts Clause, is for me something more difficult. The scope of this clause has been restricted by past decisions of the Court such as *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398 (1934), in which a Minnesota statute extending the period of time in which the mortgagor might redeem his equity following foreclosure was upheld in the face of vigorous arguments that the statute impaired a valid contract. Were there no simpler ground for disposing of the case, it would be necessary to resolve this very debatable question.

I believe that such another ground is present here, in view of the fact that Act 315 enacted by Louisiana by its terms applies only to transactions in which "the United States of America, or any of its subdivisions or agencies" is a party. While it is argued that Louisiana by other legislation made the same principle applicable

to the state government, this proposition is, as the Court's opinion points out, by no means demonstrated. And in any event the change in the period of prescriptibility was not made applicable to nongovernmental grantees.

Implicit in the holdings of a number of our cases dealing with state taxation and regulatory measures applied to the Federal Government is that such measures must be nondiscriminatory. See, *e. g.*, *James* v. *Dravo Contracting Co.*, 302 U. S. 134 (1937); *New York* v. *United States*, 326 U. S. 572 (1946); *RFC* v. *Beaver County*, 328 U. S. 204, 210 (1946).

The doctrine of intergovernmental immunity enunciated in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), however it may have evolved since that decision, requires at least that the United States be immune from discriminatory treatment by a State which in some manner interferes with the execution of federal laws. If the State of Pennsylvania could not impose a nondiscriminatory property tax on property owned by the United States, *United States* v. *Allegheny County*, 322 U. S. 174 (1944), *a fortiori*, the State of Louisiana may not enforce Act 315 against the property of the United States involved in this case. I therefore concur in the judgment of the Court.

Syllabus

WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. *v.* HYNSON, WESTCOTT & DUNNING, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 72–394. Argued April 17, 1973—Decided June 18, 1973*

The Federal Food, Drug, and Cosmetic Act of 1938, as amended in 1962, establishes a system of premarketing clearance for drugs and prohibits in § 505 (a) the introduction into commerce of any "new drug" unless a new drug application (NDA) filed with the Food and Drug Administration (FDA) was *effective* with respect to such drug. Under the Act procedures were established for filing "new drug" applications not only for the *safety* of drugs but for their *efficacy* as well. Standards were provided under which, after notice and hearing, FDA could refuse to allow an NDA to become effective, or could suspend an NDA in effect on the basis of new evidence that the drug was not effective. FDA is directed to refuse approval of an NDA and to withdraw prior approval if "substantial evidence" (§ 505 (d)) that the drug is effective for its intended use is lacking. All NDA's "effective" prior to 1962 were deemed "approved" and manufacturers were given two years to develop substantial evidence of effectiveness during which previously approved NDA's could not be withdrawn by FDA for the drug's lack of effectiveness. The 1962 Act also contained a "grandfather" clause exempting from the effectiveness requirements any drug which on the day preceding enactment (1) was commercially used or sold in the United States, (2) was not a "new drug" as defined in the 1938 Act, and (3) "was not covered by an effective application" for a new drug under the 1938 Act. FDA had permitted more than 9,000 NDA's to become effective between 1938 and 1962, of which some 4,000 were still on the market. Additionally, manufacturers have marketed thousands of "me-too" drugs without applying for clearance, drugs similar or identical to drugs with effective NDA's, marketed in reliance on

*Together with No. 72–414, *Hynson, Westcott & Dunning, Inc.* v. *Weinberger, Secretary of Health, Education, and Welfare, et al.*, also on certiorari to the same court.

the "pioneer" drug application approved by FDA. To aid it in fulfilling the statutory mandate to review all marketed drugs, whether or not previously approved, for their efficacy, FDA retained the National Academy of Sciences-National Research Council (NAS–NRC) to create expert panels to review by class the efficacy of each approved drug. Holders of NDA's were invited to furnish the panels with the best available data to establish efficacy and FDA announced that it would apply NAS–NRC efficacy findings to all drugs, including the "me-too" drugs. Respondent in No. 72–394 (Hynson) had filed an application for a drug called Lutrexin under the 1938 Act. FDA informed Hynson that the studies submitted with the application were not sufficiently well controlled to justify the claims of effectiveness, but allowed the application to become effective since the 1938 Act permitted evaluation of a new drug solely on the basis of its safety. When the 1962 amendments became effective Hynson submitted evidence of the efficacy of the drug, but the NAS–NRC panel reported that Hynson had not satisfied the requirements. Notice of an intention to withdraw approval of the NDA's covering the drug was given by the Commissioner of Food and Drugs. Before the hearing, Hynson brought suit in the District Court for a declaratory judgment that the drug was exempt from the *efficacy* review provisions of the 1962 Act, or that there was no lack of substantial evidence of the drug's efficacy. Petitioners' motion to dismiss was granted. While the District Court litigation was pending, the Commissioner denied Hynson's request for a hearing based on claims of "substantial evidence" of Lutrexin's effectiveness, and withdrew the NDA for the drug, ruling that it was not exempt from the 1962 amendments and that Hynson had not submitted adequate evidence that the drug was not a new drug or was effective. The Court of Appeals reversed, holding that while the drug was not exempt, Hynson was entitled to a hearing on the substantial-evidence issue. No. 72–414 is a cross-petition by Hynson from the judgment of the Court of Appeals, which suggested that only a district court has authority to determine whether Lutrexin is a "new drug." While Hynson agrees that the Commissioner has authority to determine new drug status in proceedings to withdraw approval of the product's NDA, some manufacturers, parties to other suits in this group of cases, advance the contrary view. *Held:*

1. The 1962 amendments and the regulations issued thereunder, which express well-established principles of scientific in-

vestigation, in their reduction of the "substantial evidence" standard to detailed guidelines for the protection of the public, make FDA's so-called administrative summary judgment procedure appropriate. Pp. 617–619.

2. FDA's procedure, whereby it will not provide a formal hearing when it is apparent at the threshold that the applicant has not tendered *any* evidence which *on its face* meets the statutory standards as particularized by the regulations, is valid. *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192; *FPC* v. *Texaco*, 377 U. S. 33. Pp. 620–622.

3. In No. 72–394, the Court of Appeals' holding that Hynson was entitled to a hearing on whether its submission of evidence satisfied its threshold burden of providing "substantial evidence" is affirmed. Pp. 622–623.

4. The heart of the statutory procedure is the grant of primary jurisdiction to FDA, subject to judicial review when administrative remedies are exhausted. Pp. 623–627.

5. Although a drug can be "generally recognized" by experts as effective for intended use within the meaning of the Act only when that expert consensus is founded upon "substantial evidence," any ruling on Lutrexin's "new drug" status is premature, and must await the outcome of the hearing on whether Hynson submitted "substantial evidence," as held in No. 72–394 (item 3, *supra*). Pp. 628–632.

6. Lutrexin is not exempt under the "grandfather" provisions of the 1962 Act, as held by FDA and the Court of Appeals, and their construction accords with the legislative history which suggests that the exemption is afforded only for drugs that never had been subject to new drug regulation. Pp. 632–634.

461 F. 2d 215, affirmed as modified.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. POWELL, J., filed an opinion concurring in the result as to Part I and joining in Part II of the Court's opinion, *post*, p. 637. BRENNAN, J., took no part in the consideration or decision of the cases. STEWART, J., took no part in the decision of the cases.

Deputy Solicitor General Friedman and *Andrew L. Frey* argued the cause for petitioners in No. 72–394 and respondents in No. 72–414. With *Mr. Frey* on the briefs were *Solicitor General Griswold, Assistant Attorney Gen-*

eral Kauper, Deputy Solicitor General Wallace, Robert B. Nicholson, Howard E. Shapiro, and *Peter Barton Hutt.*

Edward Brown Williams argued the cause for petitioner in No. 72–414 and respondent in No. 72–394. With him on the briefs was *Jan Edward Williams.*†

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These cases, together with *Weinberger* v. *Bentex Pharmaceuticals, Inc., post,* p. 645, *CIBA Corp.* v. *Weinberger, post,* p. 640, and *USV Pharmaceutical Corp.* v. *Weinberger, post,* p. 655, all here on certiorari, raise a series of questions under the 1962 amendments [1] to the Federal Food, Drug, and Cosmetic Act of 1938. 52 Stat. 1040. The 1938 Act, which established a system of premarketing clearance for drugs, prohibited the introduction into commerce of any "new drug" unless a new drug application (NDA) filed with the Food and Drug Administration (FDA) [2] was effective with respect to that drug. § 505 (a), 52 Stat. 1052. Under the 1938 Act a "new drug"

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†Briefs of *amici curiae* in both cases were filed by *Lloyd N. Cutler, Daniel Marcus,* and *William T. Lake* for Pharmaceutical Manufacturers Assn.; by *Bruce J. Terris, Joseph Onek,* and *Peter H. Schuck* for American Public Health Assn. et al.; and by *Thomas D. Finney, Jr., Thomas Richard Spradlin,* and *Daniel F. O'Keefe, Jr.,* for the Proprietary Assn. Briefs of *amici curiae* in No. 72–394 were filed by *Alan H. Kaplan* for E. R. Squibb & Sons, Inc., and by *Robert L. Wald, Selma M. Levine, Joel E. Hoffman, Philip Elman,* and *Philip J. Franks* for USV Pharmaceutical Corp.

[1] Drug Amendments of 1962 (Harris-Kefauver Act), 76 Stat. 780, amending 21 U. S. C. § 301 *et seq.*

[2] The Act originally provided for filing applications with the Secretary of Agriculture, but his functions were assigned to FDA. FDA is now part of the Department of Health, Education, and Welfare (HEW), and the Secretary of HEW has delegated his responsibilities under the Federal Food, Drug, and Cosmetic Act to the Commissioner of Food and Drugs. 21 CFR § 2.120.

was one not generally recognized by qualified experts as safe for its intended use. § 201 (p)(1). The Government could sue to enjoin violations, prosecute criminally, and seize and condemn the articles. §§ 301 (d), 302 (a), 303, 304. The Act established procedures for filing NDA's, § 505 (b), and provided standards under which, after notice and hearing, FDA could refuse to allow an NDA to become effective, §§ 505 (c) and (d), or could suspend an NDA in effect on the basis of new evidence that the drug was unsafe. § 505 (e). Orders denying or suspending an NDA could be reviewed in a district court on the administrative record. § 505 (h).

The 1962 Act amended § 201 (p)(1) of the 1938 Act to define a "new drug" as a drug not generally recognized among experts as *effective* as well as safe for its intended use. 21 U. S. C. § 321 (p)(1). A new drug, as now defined, still may not be marketed unless an NDA is in effect. FDA is now directed to refuse approval of an NDA and to withdraw any prior approval if "substantial evidence" [3] that the drug is effective for its intended use is lacking. 21 U. S. C. §§ 355 (d) and (e). Thus, the basic clearance system, requiring FDA approval of an NDA before a "new drug" may be lawfully marketed, was continued, except that FDA now either must approve or disapprove an application within 180 days. 21 U. S. C. § 355 (c). (Under the 1938 Act an application automatically became effective if it was not disapproved.) Judicial review was transferred to the courts of appeals. 21 U. S. C. § 355 (h).

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[3] "Substantial evidence" was defined to mean "evidence consisting of adequate and well-controlled investigations, including clinical investigations, by experts qualified by scientific training and experience to evaluate the effectiveness of the drug involved, on the basis of which it could fairly and responsibly be concluded by such experts that the drug will have the effect it purports or is represented to have . . . ." 21 U. S. C. § 355 (d).

Since the Act as amended requires affirmative agency approval, all NDA's "effective" prior to 1962 were deemed "approved" under the new definition, and manufacturers were given two years to develop substantial evidence of effectiveness, during which previously approved NDA's could not be withdrawn by FDA for a drug's lack of effectiveness.[4] The 1962 amendments also contain a "grandfather" clause exempting from the effectiveness requirements any drug which on the day preceding enactment (1) was commercially used or sold in the United States, (2) was not a "new drug" as defined in the 1938 Act (it being generally recognized as safe), and (3) "was not covered by an effective application" for a new drug under the 1938 Act.[5]

Between 1938 and 1962 FDA had permitted 9,457 NDA's to become effective. Of these, some 4,000 were still on the market. In addition, there were thousands of drugs which manufacturers had marketed without applying to FDA for clearance. These drugs, known as "me-toos," are similar to or identical with drugs with effective NDA's and are marketed in reliance on the "pioneer" drug application approved by FDA. In some cases, a manufacturer obtained an advisory opinion letter from FDA that its product was generally recognized among experts as safe.

To aid in its task of fulfilling the statutory mandate to review all marketed drugs for their therapeutic efficacy, whether or not previously approved, FDA retained the National Academy of Sciences-National Research Council (NAS–NRC) to create expert panels to review by class the efficacy of each approved drug. Holders of NDA's were invited to furnish the panels with

[4] Drug Amendments of 1962, §§ 107 (c)(2) and (c)(3)(B), 76 Stat. 788, note following 21 U. S. C. § 321.

[5] *Id.*, § 107 (c)(4).

the best available data to establish the effectiveness of their drugs.[6] The panels reported to FDA; and on January 23, 1968, FDA announced its policy of applying the NAS–NRC efficacy findings to all drugs, including the related "me-too" drugs.[7]

I

Respondent in No. 72–394, Hynson, Westcott & Dunning, Inc., had filed an application under the 1938 Act for a drug called Lutrexin, recommended by Hynson for use in the treatment of premature labor, threatened and habitual abortion, and dysmenorrhea. FDA informed Hynson that Hynson's studies submitted with the application were not sufficiently well controlled to justify the claims of effectiveness and urged Hynson not to represent the drug as useful for threatened and habitual abortion. But FDA allowed the application to become effective, since the 1938 Act permitted evaluation of a new drug solely on the grounds of its *safety*. Before the 1962 amendments Hynson filed an application for a related drug which FDA, again on the basis of the test of *safety*, allowed to become effective. When the 1962 amendments became effective and NAS–NRC undertook to appraise the efficacy of drugs theretofore approved as safe, Hynson submitted a list of literature references, a copy of an unpublished study, and a representative sample testimonial letter on behalf of Lutrexin. The panel of NAS–NRC

[6] 31 Fed. Reg. 9426.

[7] FDA has recently adopted a regulation declaring the manner in which Drug Efficacy Study Implementation Notices and Notices of Opportunity for Hearing apply to identical, related, and similar drugs. Any person with an interest in such drugs is provided an opportunity for hearing on any proposed withdrawal of NDA approval for the basic or pioneer drug. 37 Fed. Reg. 23185, adding § 130.40 to 21 CFR.

working in the relevant field reported to FDA that Hynson's claims for effectiveness of the drug were either inappropriate or unwarranted in the absence of submission of further appropriate documentation. At the invitation of the Commissioner of Food and Drugs, Hynson submitted additional data. But the Commissioner concluded that this additional information was inadequate and published notice of his intention to withdraw approval of the NDA's covering the drug, offering Hynson the opportunity for a prewithdrawal hearing. Before the hearing could take place, Hynson brought suit in the District Court for a declaratory judgment that the drugs in question were exempt from the *efficacy* review provisions of the 1962 amendments or, alternatively, that there was no lack of substantial evidence of the drug's *efficacy*. The Government's motion to dismiss was granted, the District Court ruling that FDA had primary jurisdiction and that Hynson had failed to exhaust its administrative remedies.

While the District Court litigation was pending, FDA promulgated new regulations establishing minimal standards for "adequate and well-controlled investigations" and limiting the right to a hearing to those applicants who could proffer at least some evidence meeting those standards.[8] Although Hynson maintained that it was not subject to the new regulations because its initial request for a hearing predated their issuance, it renewed its request and submitted the material which it claimed constituted "substantial evidence" of Lutrexin's effectiveness. The Commissioner denied the request for a hearing and withdrew the NDA for Lutrexin. He ruled that Lutrexin is not exempt from the 1962 amendments and that Hynson had not submitted adequate evidence that Lutrexin is not a new drug or is effective. The Court

[8] 35 Fed. Reg. 7251, amending 21 CFR §§ 130.12 (a) (5) and 130.14.

of Appeals reversed, 461 F. 2d 215, holding that while the drug in question was not exempt, Hynson was entitled to a hearing on the substantial-evidence question.

Section 505 (e) [9] directs FDA to withdraw approval of an NDA if the manufacturer fails to carry the burden of showing there is "substantial evidence" [10] respecting the *efficacy* of the drug. As the Court of Appeals says, "substantial evidence" was substituted for "preponderance" of the evidence. 461 F. 2d, at 220. The Act and the Regulations, in their reduction of that standard to detailed guidelines,[11] make FDA's so-called administrative summary judgment procedure appropriate.

The general contours of "substantial evidence" are defined by § 505 (d) of the Act to include "evidence consisting of adequate and well-controlled investigations, including clinical investigations, by experts qualified by scientific training and experience to evaluate the effectiveness of the drug involved, on the basis of which it could fairly and responsibly be concluded by such experts that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the labeling or proposed labeling thereof." 21 U. S. C. § 355 (d). Acting pur-

[9] Section 505 (e) as amended, 21 U. S. C. § 355 (e), provides in relevant part:

"The Secretary shall, after due notice and opportunity for hearing to the applicant, withdraw approval of an application with respect to any drug under this section if the Secretary finds . . . (3) on the basis of new information before him with respect to such drug, evaluated together with the evidence available to him when the application was approved, that there is a lack of substantial evidence that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the labeling thereof . . . ."

[10] See n. 3, *supra*.

[11] Title 21 CFR § 130.12 (a)(5) as amended, 35 Fed. Reg. 7251, is set forth in relevant part in an Appendix to this opinion.

suant to his "authority to promulgate regulations for the efficient enforcement" of the Act, § 701 (a), 21 U. S. C. § 371 (a), the Commissioner has detailed the "principles . . . recognized by the scientific community as the essentials of adequate and well-controlled clinical investigations. They provide the basis for the determination whether there is 'substantial evidence' to support the claims of effectiveness for 'new drugs' . . . ." 21 CFR § 130.12 (a)(5)(ii). They include a "plan or protocol" setting forth the objective of the study and an adequate method for selecting appropriate subjects,[12] explaining the methods of observation and steps taken to minimize bias, providing a comparison by one of four "recognized" methods of the results of treatment or diagnosis with a control, and summarizing the methods of analysis, including any appropriate statistical methods. *Id.*, § 130.12 (a)(5)(ii)(*a*). No investigation will be considered "adequate for approval of a new drug" unless the test drug is "standardized as to identity, strength, quality, purity, and dosage form to give significance to the results of the investigation." *Id.*, § 130.12 (a)(5)(ii)(*b*). Finally, the regulation provides that "[u]ncontrolled studies or partially controlled studies are not acceptable as the sole basis for the approval of claims of effectiveness. Such studies, carefully conducted and documented, may provide corroborative support . . . . Isolated case reports, random experience, and reports lacking the details which permit scientific evaluation will not be considered." *Id.*, § 130.12 (a)(5)(ii)(*c*).

Lower courts have upheld the validity of these regu-

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[12] Subjects must be chosen so that they are "suitable for the purposes of the study," assigned to test groups in such a way as to minimize bias, and comparable in terms of "pertinent variables, such as age, sex, severity, or duration of disease, and use of drugs other than the test drug." 21 CFR § 130.12 (a)(5)(ii)(*a*)(2).

lations,[13] and it is not disputed here that they express well-established principles of scientific investigation. Moreover, their strict and demanding standards, barring anecdotal evidence indicating that doctors "believe" in the efficacy of a drug, are amply justified by the legislative history. The hearings underlying the 1962 Act show a marked concern that impressions or beliefs of physicians, no matter how fervently held, are treacherous.[14] Congress in its definition of "substantial evidence" in § 505 (d) wrote the requirement of "evidence consisting of adequate and well-controlled investigations." The Senate Report makes clear that an abrupt departure was being taken from old norms for marketing drugs. There had been mounting concern over *efficacy* of drugs as well as their *safety*.[15] The Report stated: [16]

> "[A] claim could be rejected if it were found (*a*) that the investigations were not 'adequate'; (*b*) that they were not 'well controlled'; (*c*) that they had been conducted by experts not qualified to evaluate the effectiveness of the drug for which the application is made; or (*d*) that the conclusions

[13] *Upjohn Co.* v. *Finch*, 422 F. 2d 944 (CA6); *Pharmaceutical Manufacturers Assn.* v. *Richardson*, 318 F. Supp. 301 (Del.). FDA was enjoined from enforcing the regulations as originally issued on September 19, 1969, 34 Fed. Reg. 14596, on the ground that FDA had not complied with the notice requirements of the Administrative Procedure Act. *Pharmaceutical Manufacturers Assn.* v. *Finch*, 307 F. Supp. 858 (Del.). The regulations were reissued in their current form on May 8, 1970. 35 Fed. Reg. 7251.

[14] See Hearings on S. 1552 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 87th Cong., 1st Sess., pt. 1, pp. 195, 282, 411–412. Much of this aspect of the legislative background of the 1962 Act is reviewed in enlightening detail by Judge Latchum in *Pharmaceutical Manufacturers Assn.* v. *Richardson, supra*, at 306 *et seq.*

[15] S. Rep. No. 1744, 87th Cong., 2d Sess., pt. 2, p. 1.

[16] *Id.*, at 6.

drawn by such experts could not fairly and responsibly be derived from their investigations."

To be sure, the Act requires FDA to give "due notice and opportunity for hearing to the applicant" before it can withdraw its approval of an NDA. § 505 (e), 21 U. S. C. § 355 (e). FDA, however, by regulation, requires any applicant who desires a hearing to submit reasons "why the application . . . should not be withdrawn, together with a well-organized and full-factual analysis of the clinical and other investigational data he is prepared to prove in support of his opposition to the notice of opportunity for a hearing. . . . When it clearly appears from the data in the application and from the reasons and factual analysis in the request for the hearing that there is no genuine and substantial issue of fact . . . , e. g., no adequate and well-controlled clinical investigations to support the claims of effectiveness," the Commissioner may deny a hearing and enter an order withdrawing the application based solely on these data. 21 CFR § 130.14 (b). What the agency has said, then, is that it will not provide a formal hearing where it is apparent at the threshold that the applicant has not tendered *any* evidence which *on its face* meets the statutory standards as particularized by the regulations.

The propriety of such a procedure was decided in *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192, 205, and *FPC* v. *Texaco*, 377 U. S. 33, 39. We said in *Texaco:*

> "[T]he statutory requirement for a hearing under § 7 [of the Natural Gas Act] does not preclude the Commission from particularizing statutory standards through the rulemaking process and barring at the threshold those who neither measure up to them nor show reasons why in the public interest the rule should be waived." *Ibid.*

There can be no question that to prevail at a hearing an applicant must furnish evidence stemming from "adequate and well-controlled investigations." We cannot impute to Congress the design of requiring, nor does due process demand, a hearing when it appears conclusively from the applicant's "pleadings" that the application cannot succeed.[17]

The NAS–NRC panels evaluated approximately 16,500 claims made on behalf of the 4,000 drugs marketed pursuant to effective NDA's in 1962. Seventy percent of these claims were found not to be supported by substantial evidence of effectiveness, and only 434 drugs were found effective for all their claimed uses. If FDA were required automatically to hold a hearing for each product whose efficacy was questioned by the NAS–NRC study, even though many hearings would be an exericse in futility, we have no doubt that it could not fulfill its statutory mandate to remove from the market all those drugs which do not meet the effectiveness requirements of the Act.

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[17] This applies, of course, only to those regulations that are precise. For example, the plan or protocol for a study must include "[a] summary of the methods of analysis and an evaluation of data derived from the study, including any appropriate statistical methods." 21 CFR § 130.12(a)(5)(ii)(*a*)(5). A mere reading of the study submitted will indicate whether the study is totally deficient in this regard. Some of the regulations, however, are not precise, as they call for the exercise of discretion or subjective judgment in determining whether a study is adequate and well controlled. For example, § 130.12 (a)(5)(ii)(*a*)(2)(*i*) requires that the plan or protocol for the study include a method of selection of the subjects that provide "*adequate* assurance that they are suitable for the purposes of the study." (Emphasis added.) The qualitative standards "adequate" and "suitable" do not lend themselves to clear-cut definition, and it may not be possible to tell from the face of a study whether the standards have been met. Thus, it might not be proper to deny a hearing on the ground that the study did not comply with this regulation.

If this were a case involving trial by jury as provided in the Seventh Amendment, there would be sharper limitations on the use of summary judgment,[18] as our decisions reveal. See, *e. g., Adickes* v. *Kress & Co.,* 398 U. S. 144, 153–161; *White Motor Co.* v. *United States,* 372 U. S. 253. But Congress surely has great leeway in setting standards for releasing on the public, drugs which may well be miracles or, on the other hand, merely easy money-making schemes through use of fraudulent articles labeled in mysterious scientific dress. The standard of "well-controlled investigations" particularized by the regulations is a protective measure designed to ferret out those drugs for which there is no affirmative, reliable evidence of effectiveness. The drug manufacturers have full and precise notice of the evidence they must present to sustain their NDA's, and under these circumstances we find FDA hearing regulations unexceptionable on any statutory or constitutional ground.

Our conclusion that the summary judgment procedure of FDA is valid does not end the matter, for Hynson argues that its submission to FDA satisfied its threshold burden. In reviewing an order of the Commissioner denying a hearing, a court of appeals must determine whether the Commissioner's findings accurately reflect the study in question and if they do, whether the deficiencies he finds conclusively render the study inadequate or uncontrolled in light of the pertinent regulations.[19]

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[18] Under the Rules of Civil Procedure the party moving for summary judgment has the burden of showing the absence of a genuine issue as to any material fact. *Adickes* v. *Kress & Co.,* 398 U. S. 144, 157.

[19] Under the Administrative Procedure Act, a court reviews agency findings to determine whether they are supported by substantial evidence only in a case subject to the hearing provisions of 5 U. S. C. §§ 556 and 557 or "otherwise reviewed on the record of an agency hearing provided by statute . . . ." 5 U. S. C. § 706 (2)(E) This

There is a contrariety of opinion within the Court concerning the adequacy of Hynson's submission. Since a majority are of the view that the submission was sufficient to warrant a hearing, we affirm the Court of Appeals on that phase of the case.

II

No. 72–414 is a cross-petition by Hynson from the judgment of the Court of Appeals. This cross-petition raises questions concerning the "new drug" provisions of the 1962 amendments. The Court of Appeals suggested that only a district court has authority to determine whether Lutrexin is a "new drug." The Government contends that the Commissioner has authority to determine new drug status in proceedings to withdraw approval of the product's NDA under § 505 (e). Although Hynson agrees, some of the manufacturers, parties to other suits in this group of cases, advance the contrary view.

Prior to 1938 there was no machinery for the premarketing approval of drugs sold in commerce. Under the 1906 Act, 34 Stat. 768, adulterated and misbranded drugs were narrowly defined, and the Act provided only criminal sanctions and seizure by libel for condemnation. As previously noted, the 1938 Act provided for regulatory clearance of drugs prior to marketing and for administrative suspension of any clearance if required in the interests of public safety. To introduce a new drug an application had to be effective with respect to that drug. The application was to become effective within a fixed period unless the agency after notice and opportunity for hearing refused to permit it to become effective, finding that

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is not such a case. The question with which we are concerned involves the initial agency determination whether a hearing is required by statute. See *Pfizer, Inc.* v. *Richardson,* 434 F. 2d 536, 546–547 (CA2).

it could not determine from existing evidence or had not been shown that it was safe. 52 Stat. 1041–1042, 1052. Any NDA could be suspended if clinical experience or new testing showed that the drug was not safe. *Id.*, at 1053. Orders denying or suspending an NDA were reviewable on the administrative record in a district court. *Ibid.* Marketing a new drug without an effective NDA could be enjoined or made the basis of a criminal prosecution, or the drug could be seized in libel and condemnation proceedings.

There was a steady stream of NDA's under that Act supported by voluminous data.[20] Many new drugs claiming "me-too" status were marketed illegally or were launched with an advisory opinion of FDA that they were recognized as safe. It is estimated that by 1969 there were five identical or similar drugs for every drug with an effective NDA. Enormous administrative problems were created. Each NDA contained about 30 volumes, a stack 10 to 12 feet high; and some contained as many as 400 volumes of data.

It is clear to us that FDA has power to determine whether particular drugs require an approved NDA in order to be sold to the public. FDA is indeed the administrative agency selected by Congress to administer the Act, and it cannot administer the Act intelligently and rationally unless it has authority to determine what drugs are "new drugs" under § 201 (p) and whether they are exempt from the efficacy requirements of the 1962 amendments by the grandfather clause of § 107 (c)(4).

Regulatory agencies have by the requirements of particular statutes usually proceeded on a case-by-case basis, giving each person subject to regulation separate hear-

[20] 1939 Annual Report FDA; 1941 Annual Report FDA; Annual Reports Federal Security Agency (1938–1952); Annual Reports HEW (1953–1962).

ings. But there is not always a constitutional reason why that must be done. *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192, is one example. We there upheld rules of the Federal Communications Commission limiting the number of broadcasting stations a single individual might own, saying that that was a proper exercise of the agency's "rule-making authority necessary for the orderly conduct of its business." *Id.*, at 202. The comprehensive, rather than the individual, treatment may indeed be necessary for quick effective relief. See *Permian Basin Area Rate Cases*, 390 U. S. 747. A generic drug—which is found to be unsafe and/or lacking in efficacy—may be manufactured by several persons or manufacturers. To require separate judicial proceedings to be brought against each, as if each were the owner of a Black Acre being condemned, would be to create delay where in the interests of public health there should be prompt action. A single administrative proceeding in which each manufacturer may be heard is constitutionally permissible measured by the requirements of procedural due process.

FDA maintains that a withdrawal of any NDA approval covers all "me-too" drugs. For the reasons stated, that procedure is a permissible one where every manufacturer of a challenged drug has an opportunity to be heard. FDA under § 554 of the Administrative Procedure Act may issue a declaratory order governing all drugs covered by a particular NDA. 5 U. S. C. § 554 (e). That section prescribes the procedures an agency must follow "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." § 554 (a). The industry maintains that § 554 (e) is of no avail to FDA because in a withdrawal proceeding a common issue is whether a drug is a "new drug." That issue, it is argued, can be resolved only in a court proceeding where there is an adjudication

"on the record of [a] hearing." But that assumes an individualized hearing and adjudication as is common in regulatory proceedings. Section 554 (e), however, does not place administrative proceedings in that straitjacket. It provides that an agency "in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." The termination of a controversy over a "new drug" may often be of prime importance. This is an age of ever-expanding dockets at the administrative as well as at the judicial level. If the administrative controls over drugs are to be efficient, they must be exercised with dispatch. Only paralysis would result if case-by-case battles in the courts were the only way to protect the public against unsafe or ineffective drugs. Moreover, if every "me-too" drug in a particular generic category had to be put to the test in court actions, great inequities might well result. It might take months to eliminate one "me-too" drug manufactured by one company from the market. Meanwhile, competitors selling drugs in the same category would go scot-free until the tedious and laborious procedures of litigation reached them. We cannot believe that Congress engaged in such an exercise in futility when it enacted the 1962 amendments. That would in effect restore the enforcement provisions to the status they enjoyed under the rather primitive 1906 Act. We hold that FDA by reasons of § 554 (e) of the Administrative Procedure Act may issue a declaratory order to terminate a controversy over a "new drug" or to remove any uncertainty whether a particular drug is a "new drug" within the meaning of § 201 (p)(1) of the 1938 Act. See *Abbott Laboratories* v. *Gardner*, 387 U. S. 136.

It is argued, however, that the only lawful purpose of an FDA hearing is to allow it a method for determining which lawsuits it will file in the future. Yet that is only another version of the tactics of delay and procras-

tination which the industry offers as the way best to serve industry's needs. The public needs are, however, opposed and paramount. We do not accept the invitation to hold that FDA has no jurisdiction to determine whether a particular drug is a "new drug" and to decide whether an NDA should be withdrawn.

Its determination that a product is a "new drug" or a "me-too" drug is, of course, reviewable. But its jurisdiction to determine whether it has jurisdiction is as essential to its effective operation as is a court's like power. Cf. *United States* v. *Shipp,* 203 U. S. 563, 573. The heart of the new procedures designed by Congress is the grant of primary jurisdiction to FDA, the expert agency it created. FDA does not have the final say, for review may be had, not in a district court (except in a limited group of cases we will discuss), but in a court of appeals. FDA does not have unbridled discretion to do what it pleases. Its procedures must satisfy the rudiments of fair play. Judicial relief is available only after administrative remedies have been exhausted.

It is argued that though FDA is empowered to decide the threshold question whether the drug is a "new drug," that power is only an incident to its power to approve or withdraw approval of NDA's. Some manufacturers, however, have no NDA's in effect and are not seeking approval of any drugs. Nevertheless, FDA may make a declaratory order that a drug is a "new drug." While that order is not reviewable in the court of appeals under § 505 (h), it is reviewable by the district court under the Administrative Procedure Act. 5 U. S. C. §§ 701–704; *Citizens to Preserve Overton Park* v. *Volpe,* 401 U. S. 402, 410; *Abbott Laboratories* v. *Gardner, supra,* at 139–148. By analogy an agency order declaring a commodity not exempt from regulation is normally a declaratory order that is reviewable, as we held in *Frozen Food Express* v. *United States,* 351 U. S. 40.

The question then presented is whether FDA properly exercised its jurisdiction in this instance. As indicated above, Hynson in requesting an administrative hearing also asked FDA to decide that Lutrexin is not a "new drug" within the meaning of § 201 (p) as amended, 21 U. S. C. § 321 (p).[21] In addition, it asked that Lutrexin be "grandfathered" under § 107 (c)(4) of the 1962 amendments.[22] The Commissioner rejected both claims. Finding that Hynson had failed to present any evidence of adequate and well-controlled investigations in support

[21] That section provides:

"The term 'new drug' means—

"(1) Any drug (except a new animal drug or an animal feed bearing or containing a new animal drug) the composition of which is such that such drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety and effectiveness of drugs, as safe and effective for use under the conditions prescribed, recommended, or suggested in the labeling thereof, except that such a drug not so recognized shall not be deemed to be a 'new drug' if at any time prior to the enactment of this chapter it was subject to the Food and Drugs Act of June 30, 1906, as amended, and if at such time its labeling contained the same representations concerning the conditions of its use; or

"(2) Any drug (except a new animal drug or an animal feed bearing or containing a new animal drug) the composition of which is such that such drug, as a result of investigations to determine its safety and effectiveness for use under such conditions, has become so recognized, but which has not, otherwise than in such investigations, been used to a material extent or for a material time under such conditions."

[22] That section provides:

"In the case of any drug which, on the day immediately preceding the enactment date, (A) was commercially used or sold in the United States, (B) was not a new drug as defined by section 201 (p) of the basic Act as then in force, and (C) was not covered by an effective application under section 505 of that Act, the amendments to section 201 (p) made by this Act shall not apply to such drug when intended solely for use under conditions prescribed, recommended, or suggested in labeling with respect to such drug on that day."

of Lutrexin's effectiveness, he concluded that "there is no data base upon which experts can fairly and responsibly conclude that the safety and effectiveness of the drugs has been proven and is so well established that the drugs can be generally recognized among such experts as safe and effective for their intended uses." The Commissioner also held that Lutrexin is not exempt under § 107 (c)(4) because its NDA, which had become effective in 1953, had not been withdrawn prior to the enactment of the 1962 amendments and thus was "covered by an effective application" within the meaning of § 107 (c)(4)(C). The Court of Appeals affirmed the Commissioner's ruling that Lutrexin is not exempt under § 107 (c)(4). It did not discuss his holding that Lutrexin currently is a "new drug." Although we agree that the Commissioner properly ruled that Lutrexin does not come within § 107 (c)(4), we conclude that the Commissioner's order with respect to Lutrexin's "new drug" status must be vacated.

The thrust of § 201 (p) is both qualitative and quantitative. The Act, however, nowhere defines what constitutes "general recognition" among experts. Hynson contends that the "lack of substantial evidence" is applicable only to proof of the *actual* effectiveness of drugs that fall within the definition of a new drug and not to the initial determination under § 201 (p) whether a drug is "generally recognized" as effective. It would rely solely on the testimony of physicians and the extant literature, evidence that has been characterized as "anecdotal." We agree with FDA, however, that the statutory scheme and overriding purpose of the 1962 amendments compel the conclusion that the hurdle of "general recognition" of effectiveness requires at least "substantial evidence" of effectiveness for approval of an NDA. In the absence of any evidence of adequate and well-controlled investigation supporting the efficacy of Lutrexin, *a fortiori*

Lutrexin would be a "new drug" subject to the provisions of the Act.[23]

As noted, the 1962 amendments for the first time gave FDA power to scrutinize and evaluate drugs for effectiveness as well as safety. The Act requires the Commissioner to disapprove any application when there is a lack of "substantial evidence" that the applicant's drug is effective. § 505 (d), 21 U. S. C. § 355 (d). Similarly, he may withdraw approval for any drug if he subsequently determines that there is a lack of such evidence. § 505 (e), 21 U. S. C. § 355 (e). Evidence may be accepted only if it consists of "adequate and well-controlled investigations, including clinical investigations, by experts qualified by scientific training and experience to evaluate the effectiveness of the drug involved . . . ." § 505 (d), 21 U. S. C. § 355 (d). The legislative history of the Act indicates that the test was to be a rigorous one. The "substantial evidence" requirement reflects the conclusion of Congress, based upon hearings,[24] that clinical impressions of practicing physicians and poorly controlled experiments do not constitute an adequate basis for establishing efficacy. This policy underlies the regulations defining the contours of "substantial evidence": "Uncontrolled studies or partially controlled studies are not acceptable as the sole basis for the approval of claims of effectiveness. Such studies, carefully conducted and documented, may provide corroborative support of well-controlled studies . . . . Isolated case reports, random experience, and reports lacking the details which permit scientific evaluation will not be considered." 21 CFR § 130.12 (a)(5)(ii)(*c*).

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[23] It also follows that if Hynson were not entitled to a hearing under § 505 (e), it would not be entitled to a hearing on its claim that Lutrexin is not a "new drug."

[24] See Hearings, *supra*, n. 14.

These efficacy requirements were not designed to be prospective only. Clearly, after the initial two-year moratorium on existing drugs, FDA has the power to withdraw an application which became effective prior to the adoption of the 1962 amendments, if the applicant has not provided "substantial evidence" of the drug's efficacy. The Act plainly contemplates that such drugs will be evaluated on the basis of adequate and well-controlled investigations. Hynson would have us hold that withdrawal proceedings can be thwarted by a showing of general recognition of effectiveness based merely on expert testimony and reports with respect to investigations and clinical observation regardless of the controls used. But, we cannot construe § 201 (p) to deprive FDA of jurisdiction over a drug which, if subject to FDA regulation, could not be marketed because it had not passed the "substantial evidence" test. To do so "would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480, 489.

Moreover, the interpretation of § 201 (p) urged by Hynson is not consistent with the statutory scheme as it operates on a purely prospective basis. Under subsection (2), a drug cannot transcend "new drug" status until it has been used "to a material extent or for a material time." Yet, a drug cannot be marketed lawfully before an NDA has been approved by the Commissioner on the basis of "substantial evidence." As the Solicitor General argues, "the Act is designed so that drugs on the market, unless exempt, will have mustered the requisite scientifically reliable evidence of effectiveness long before they are in a position to drop out of active regulation by ceasing to be a 'new drug.' "

It is well established that our task in interpreting separate provisions of a single Act is to give the Act "the most harmonious, comprehensive meaning possible" in

light of the legislative policy and purpose. *Clark* v. *Uebersee Finanz-Korp., supra,* at 488; see *United States* v. *Bacto-Unidisk,* 394 U. S. 784, 798. We accordingly have concluded that a drug can be "generally recognized" by experts as effective for intended use within the meaning of the Act only when that expert consensus is founded upon "substantial evidence" as defined in § 505 (d). We have held in No. 72–394, however, that the Commissioner was not justified in withdrawing Hynson's NDA without a prior hearing on whether Hynson had submitted "substantial evidence" of Lutrexin's effectiveness. Consequently, any ruling as to Lutrexin's "new drug" status is premature and must await the outcome of this hearing.

Finally, we cannot agree with Hynson that Lutrexin is exempt from the provisions of the Act by virtue of § 107 (c)(4) of the 1962 amendments. That section provides that no drug will be treated as a "new drug" if, on the day preceding the adoption of the amendments, the drug "(A) was commercially used or sold in the United States, (B) was not a new drug as defined by section 201 (p) of the basic Act as then in force, and (C) was not covered by an effective application under section 505 of that Act . . . ." The applicability of this section turns solely on whether Lutrexin was "covered" by an effective NDA immediately prior to the adoption of the 1962 amendments. Hynson argues that when Lutrexin became generally recognized as safe and was no longer a "new drug," its NDA ceased to be effective.[25]

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[25] Hynson also argues that Lutrexin is exempt by operation of § 107 (c)(2), which provides:

"An application filed pursuant to section 505 (b) of the basic Act which was 'effective' within the meaning of that Act on the day immediately preceding the enactment date shall be deemed, as of the enactment date, to be an application 'approved' by the Secretary within the meaning of the basic Act as amended by this Act."

Hynson contends that Lutrexin, generally recognized as safe prior

That argument draws no statutory support. The 1938 Act did not provide any mechanism other than the Commissioner's suspension authority under § 505 (e), whereby an NDA once effective could cease to be effective. Indeed, § 505 (e) leads to the conclusion that an NDA remains effective unless it is suspended. That section empowers FDA to withdraw approval of an NDA whenever new evidence comes to light suggesting that the drug has become unsafe, whether or not the drug was generally recognized as safe in the interim.

Moreover, Hynson's argument, as the Court of Appeals recognized, would render clause (C) superfluous. Under Hynson's reasoning, any drug that could satisfy clause (B)—*i. e.*, any drug that had become generally recognized as safe—automatically would satisfy clause (C). This construction, therefore, offends the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect. See, *e. g., Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307; *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208. The

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to 1962, was not a "new drug" under applicable standards before the 1962 amendments. Thus, the argument goes, its NDA had ceased to be effective and could not be deemed "approved" under § 107 (c)(2). Consequently, there was no approval that could be withdrawn in administrative proceedings pursuant to § 505 (e).

This argument shares a common thread with the argument under § 107 (c)(4)—that the NDA for Lutrexin had ceased to be effective. The argument is no more persuasive under § 107 (c)(2) than § 107 (c)(4). In addition, the construction offered by Hynson would upset the carefully drawn transitionary provisions of §§ 107 (c)(2) and (c)(3). Since the Commissioner now must affirmatively approve or disapprove all NDA's, § 107 (c)(2) was enacted to remove the administrative burden of approving each and every NDA then effective. It also protected the marketing authority of all manufacturers that had effective NDA's. Without this provision, no manufacturer whose drug had become generally recognized as safe could have continued to market the drug if it was not also generally recognized as effective.

interpretation accorded by the Commissioner and the Court of Appeals, on the other hand, does give clause (C) operative effect. It would limit the exemption to drugs, generally recognized as safe, which had not come under the blanket of an effective NDA. This interpretation accords with the legislative history which suggests that the exemption is afforded only for drugs that never had been subject to new drug regulation.[26]

Except for the modification with respect to Lutrexin's "new drug" status, the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE BRENNAN took no part in the consideration or decision of these cases. MR. JUSTICE STEWART took no part in the decision of these cases.

APPENDIX TO OPINION OF THE COURT

Title 21 CFR § 130.12 (a)(5) provides:

(ii) The following principles have been developed over a period of years and are recognized by the scientific community as the essentials of adequate and well-controlled clinical investigations. They provide the basis for the determination whether there is "substantial evidence" to support the claims of effectiveness for "new drugs" and antibiotic drugs.

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[26] See S. Rep. No. 1744, 87th Cong., 2d Sess., pt. 2, p. 8; H. R. Rep. No. 2464, 87th Cong., 2d Sess., 12; H. R. Rep. No. 2526, 87th Cong., 2d Sess., 22–23. Hynson contends that the construction afforded by FDA renders the exemption nugatory and defeats the legislative purpose. The provision, however, does exempt drugs that, as a generic class, were never subject to new drug regulation. These consist primarily of over-the-counter drugs which, although they were not "grandfathered" under the 1938 Act, were not subject to new drug regulation because of universal recognition of the safety of their old, established ingredients at the time they came on the market.

(*a*) The plan or protocol for the study and the report of the results of the effectiveness study must include the following:

(1) A clear statement of the objectives of the study,

(2) A method of selection of the subjects that—

(*i*) Provides adequate assurance that they are suitable for the purposes of the study, diagnostic criteria of the condition to be treated or diagnosed, confirmatory laboratory tests where appropriate, and, in the case of prophylactic agents, evidence of susceptibility and exposure to the condition against which prophylaxis is desired.

(*ii*) Assigns the subjects to test groups in such a way as to minimize bias.

(*iii*) Assures comparability in test and control groups of pertinent variables, such as age, sex, severity, or duration of disease, and use of drugs other than the test drug.

(3) Explains the methods of observation and recording of results, including the variables measured, quantitation, assessment of any subject's response, and steps taken to minimize bias on the part of the subject and observer.

(4) Provides a comparison of the results of treatment or diagnosis with a control in such a fashion as to permit quantitative evaluation. The precise nature of the control must be stated and an explanation given of the methods used to minimize bias on the part of the observers and the analysts of the data. Level and methods of "blinding," if used, are to be documented. Generally, four types of comparison are recognized:

(*i*) No treatment: Where objective measurements of effectiveness are available and placebo effect is negligible, comparison of the objective results in comparable groups of treated and untreated patients.

(*ii*) Placebo control: Comparison of the results of use of the new drug entity with an inactive preparation designed to resemble the test drug as far as possible.

(*iii*) Active treatment control: An effective regimen of therapy may be used for comparison, e. g., where the condition treated is such that no treatment or administration of a placebo would be contrary to the interest of the patient.

(*iv*) Historical control: In certain circumstances, such as those involving diseases with high and predictable mortality (acute leukemia of childhood), with signs and symptoms of predictable duration or severity (fever in certain infections), or in case of prophylaxis, where morbidity is predictable, the results of use of a new drug entity may be compared quantitatively with prior experience historically derived from the adequately documented natural history of the disease or condition in comparable patients or populations with no treatment or with a regimen (therapeutic, diagnostic, prophylactic) the effectiveness of which is established.

(5) A summary of the methods of analysis and an evaluation of data derived from the study, including any appropriate statistical methods.

Provided, however, That any of the above criteria may be waived in whole or in part, either prior to the investigation or in the evaluation of a completed study, by the Director of the Bureau of Drugs with respect to a specific clinical investigation; a petition for such a waiver may be filed by any person who would be adversely affected by the application of the criteria to a particular clinical investigation; the petition should show that some or all of the criteria are not reasonably applicable to the investigation and that alternative procedures can be, or have been, followed, the results of which will or have yielded data that can and should be accepted as substantial evidence of the drug's effectiveness. A petition for a waiver shall set forth clearly and concisely the specific provision or provisions in the criteria from which waiver is sought, why the criteria are not reasonably applicable to the par-

ticular clinical investigation, what alternative procedures, if any, are to be, or have been, employed, what results have been obtained, and the basis on which it can be, or has been, concluded that the clinical investigation will or has yielded substantial evidence of effectiveness, notwithstanding nonconformance with the criteria for which waiver is requested.

(*b*) For such an investigation to be considered adequate for approval of a new drug, it is required that the test drug be standardized as to identity, strength, quality, purity, and dosage form to give significance to the results of the investigation.

(*c*) Uncontrolled studies or partially controlled studies are not acceptable as the sole basis for the approval of claims of effectiveness. Such studies, carefully conducted and documented, may provide corroborative support of well-controlled studies regarding efficacy and may yield valuable data regarding safety of the test drug. Such studies will be considered on their merits in the light of the principles listed here, with the exception of the requirement for the comparison of the treated subjects with controls. Isolated case reports, random experience, and reports lacking the details which permit scientific evaluation will not be considered.

MR. JUSTICE POWELL, concurring in part, and concurring in the result in part.

I concur in Part II of the Court's opinion, which disposes of the issues raised by Hynson, Westcott & Dunning, Inc., in its cross-petition (No. 72–414). As to Part I, which addresses issues raised in the petition filed by the Commissioner of FDA (No. 72–394), I concur only in the result and state briefly the limited sense in which I accept the Court's conclusion.

Insofar as the Court today sustains the holding below that Hynson's submission to FDA raised "a genuine and

substantial issue of fact" requiring a hearing on the ultimate issue of efficacy, 21 CFR § 130.14 (b), I am in accord. Hynson's presentation in support of the efficacy of Lutrexin clearly justified a hearing as to whether the drug was supported by "adequate and well-controlled investigations," 21 U. S. C. § 355 (d), even as that term is defined in the Commission's regulations. 21 CFR § 130.12 (a)(5). For this reason I concur in the result reached in this case. I cannot agree on this record, however, with any implications or conclusions in the Court's opinion to the effect that the regulations—as construed and applied by the Commissioner in this case—are either compatible with the statutory scheme or constitutional under the Due Process Clause.[1] Such questions have not been squarely presented here and, in light of the Court's conclusion that Hynson has complied with the regulations, their resolution is unnecessary to the Court's decision.

Were we required to reach these issues, there might well be serious doubt whether the Commissioner's rigorous threshold specifications as to proof of "adequate and well-controlled investigations," coupled with his restrictive summary judgment regulation, go beyond the statutory requirements and in effect frustrate the congressional mandate for a prewithdrawal "opportunity for hearing." 21 U. S. C. § 355 (e). There is also a genuine issue of procedural due process where, as in this case, the Commissioner construes his regulations to deny a hearing as to the efficacy of a drug established and used by the medical profession for two decades, and where its effec-

[1] Cf. *Fuentes* v. *Shevin*, 407 U. S. 67, 80 (1972), and cases cited therein. I do not question, of course, the authority of the Commissioner to adopt reasonable regulations consistent with the statute and which do not, as applied, deprive persons of their property without the elementary due process of a fair opportunity for a hearing.

tiveness is supported by a significant volume of clinical data and the informed opinions of experts whose qualifications are not questioned.[2]

These important and complex questions should await decision in future cases in which the issues are briefed fully and are necessary to the Court's decision.

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[2] There can be no doubt, both from the legislative history and the language of the 1962 amendments to the Act, that Congress intended to impose standards that would bar reliance upon anecdotal evidence or mere professions of belief by doctors as determinative of a drug's efficacy. But it is also clear that Congress intended to protect against the arbitrary withdrawal or withholding of approval of a drug where there is "substantial evidence" of its effectiveness. To provide protection against such action, especially when authority is vested in an official who acts in an administrative as well as judicial capacity, the Act specifically provides for a hearing. The public interest is twofold: (i) to remove from the market, in accordance with due process, drugs of no utility or effectiveness; and (ii) to retain on the market those drugs that are efficacious. In an understandable zeal to remove the former, an administrative agency must not overlook both the interest of the public and the right of the proprietor in protecting the drugs that are useful in the prevention, control, or treatment of illness.

CIBA CORP. *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 72-528. Argued April 17, 1973—Decided June 18, 1973

Petitioner manufactures a drug called Ritonic Capsules, for which it filed a new drug application (NDA) that became effective in 1959, on the basis of the drug's safety. After the enactment of the 1962 amendments to the Federal Food, Drug, and Cosmetic Act, the Food and Drug Administration (FDA) withdrew approval of the NDA on the ground that there was no substantial evidence that the drug was *effective* as claimed, under § 505 of the Act. Petitioner sought review of the withdrawal order in the Court of Appeals for the Second Circuit, as provided in § 505 (h), and that court affirmed the order. Prior to the issuance of the withdrawal order, petitioner sought declaratory and injunctive relief in the District Court in New Jersey, which granted the Government's motion to dismiss the complaint for lack of jurisdiction. The Court of Appeals for the Third Circuit affirmed, holding that FDA was authorized to decide the jurisdictional question as an incident of its power to approve or withdraw approval for NDA's, that its decision was reviewable on direct appeal by a court of appeals, and since the Court of Appeals for the Second Circuit had ruled against petitioner on that appeal, the jurisdictional issue could not be relitigated in a separate suit for a declaratory judgment. *Held:*

1. FDA has jurisdiction in an administrative proceeding to determine whether a drug product is a "new drug" within the meaning of § 201 (p) of the Act. *Weinberger* v. *Bentex Pharmaceuticals, Inc.*, *post*, p. 645. Pp. 643-644.

2. While the Act provides FDA with sanctions, such as civil injunction proceedings, criminal penalties, and *in rem* seizure and condemnation, to enforce the prohibition against sale in commerce of any article in violation of § 505, the Act does not create a dual system, one administrative and the other judicial. P. 644.

3. Where petitioner had an opportunity to litigate the "new drug" issue before FDA and to raise the issue on appeal to

a court of appeals, it may not relitigate the issue in another proceeding. P. 644.

463 F. 2d 225, affirmed.

DOUGLAS, J., delivered the opinion of the Court, in which all Members joined, except BRENNAN, J., who took no part in the consideration or decision of the case, and STEWART, J., who took no part in the decision of the case.

Clyde A. Szuch argued the cause and filed a brief for petitioner.

Deputy Solicitor General Friedman argued the cause for respondents. On the briefs were *Solicitor General Griswold, Assistant Attorney General Kauper, Andrew L. Frey, Howard E. Shapiro, George Edelstein,* and *Peter Barton Hutt.**

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner manufactures a drug called Ritonic Capsules† for which it filed a new drug application (NDA) that became effective in 1959. Under the Act then in force, an NDA for a "new drug" required the manufacturer to submit to the Food and Drug Administration (FDA) adequate proof of the drug's safety. This

*Briefs of *amici curiae* urging reversal were filed by *Lloyd N. Cutler, Daniel Marcus,* and *William T. Lake* for Pharmaceutical Manufacturers Assn., and by *Thomas D. Finney, Jr., Thomas Richard Spradlin,* and *Daniel F. O'Keefe, Jr.,* for the Proprietary Assn.

Bruce J. Terris, Joseph Onek, and *Peter H. Schuck* filed a brief for American Public Health Assn. et al. as *amici curiae* urging affirmance.

†It is a prescription drug recommended "for patients who are losing their drive, alertness, vitality and zest for living because of the natural degenerative changes of advancing years"; and for patients who are "debilitated or depressed by chronic illness, overwork, etc., as well as those recuperating from illness or surgery."

particular NDA became effective on the basis of the drug's safety. As we have noted in the companion cases, the 1962 amendments to the Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040, as amended, 76 Stat. 780, directed FDA to withdraw approval for NDA's which became effective prior to that time if, after notice and opportunity for hearing, it found a lack of "substantial evidence" that the drug involved was *effective* as claimed in its labeling. And, as we have noted, "substantial evidence" as used in the Act, §§ 505 (d) and 505 (e)(3), 21 U. S. C. §§ 355 (d) and 355 (e)(3), means "adequate and well-controlled investigations" from which experts may conclude that the drug will have the claimed effect.

A panel of the National Academy of Sciences-National Research Council (NAS–NRC) reviewed the claims made for Ritonic Capsules and found it "ineffective" for each of the claims. FDA concluded there was a lack of substantial evidence of its efficacy and gave notice of its intent to withdraw the NDA, offering petitioner an opportunity to submit the required kind of data bearing on the efficacy of the drug and stating that withdrawal of approval of the NDA would cause the Ritonic Capsules to be a "new drug" for which no NDA was in effect, thereby making future sales unlawful.

Petitioner responded, submitting data on the issue of efficacy and maintained that Ritonic Capsules was not a "new drug" for purposes of the Act as amended. FDA concluded that petitioner's evidence was insufficient to establish effectiveness and gave notice of a hearing on the withdrawal of the NDA. Petitioner responded, contested FDA's authority to proceed further, and claimed that the product was not a "new drug" under the 1962 Act. It reserved the right to establish its position in the administrative proceedings, in judicial proceedings, or in both. Petitioner filed no more data to support its

position; and accordingly FDA withdrew approval of the NDA on the ground that there was no substantial evidence that the drug was effective as claimed. Petitioner sought review of the withdrawal order in the Court of Appeals for the Second Circuit, as provided in § 505 (h), 21 U. S. C. § 355 (h). The Court of Appeals affirmed the withdrawal order. *CIBA-Geigy Corp.* v. *Richardson,* 446 F. 2d 466.

Meanwhile, and prior to the issuance of the withdrawal order, petitioner brought suit in the District Court for the District of New Jersey seeking declaratory and injunctive relief. After hearing, the District Court granted the Government's motion to dismiss the complaint for lack of jurisdiction. On appeal, the Court of Appeals for the Third Circuit affirmed, 463 F. 2d 225, holding that FDA was authorized to decide the jurisdictional question as an incident of its power to approve or withdraw approval for NDA's, that its decision on that issue was reviewable on direct appeal by a court of appeals, and since the Court of Appeals for the Second Circuit had ruled against petitioner on that appeal, the jurisdictional question could not be relitigated in a separate suit for a declaratory judgment. We affirm the Court of Appeals.

We have stated in *Weinberger* v. *Bentex Pharmaceuticals, Inc., post,* p. 645, our reasons for concluding that FDA has jurisdiction in an administrative proceeding to determine whether a drug product is a "new drug" within the meaning of § 201 (p) of the Act, 21 U. S. C. § 321 (p). A decision that FDA lacks authority to determine in its own proceedings the coverage of the Act it administers, subject of course to judicial review, would seriously impair FDA's ability to discharge the responsibilities placed on it by Congress. As we said in *Weinberger* v. *Hynson, Westcott & Dunning, Inc., ante,* p. 609, and the *Bentex* case, *supra,* the definition of "new drug" as used in § 201 (p)(1) in-

volves a determination of technical and scientific questions by experts. The agency is therefore appropriately the arm of Government to make the threshold determination of the issue of coverage. Cf. *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186, 210–211, n 47.

It is, of course, true that the Act gives FDA a second line of defense—civil injunction proceedings, criminal penalties, and *in rem* seizure and condemnation. See §§ 302 (a), 303, 304, 21 U. S. C. §§ 332 (a), 333, 334. Those are sanctions to enforce the prohibition of the Act against the sale in commerce of any article in violation of § 505. But the Act does not create a dual system of control—one administrative, and the other judicial. Cases may arise where there has been no formal administrative determination of the "new drug" issue, it being first tendered to a district court. Even then, however, the district court might well stay its hand, awaiting an appropriate administrative determination of the threshold question. See the *Bentex* case, *supra.* Where there is, however, an administrative determination, whether it be explicit or implicit in the withdrawal of an NDA, the tactic of "reserving" the threshold question (the jurisdictional issue) for later judicial determination is not tolerable. There is judicial review of FDA's ruling. But petitioner, having an opportunity to litigate the "new drug" issue before FDA and to raise the issue on appeal to a court of appeals, may not relitigate the issue in another proceeding. *Yakus* v. *United States,* 321 U. S. 414, 444–446.

Affirmed.

MR. JUSTICE BRENNAN took no part in the consideration or decision of this case. MR. JUSTICE STEWART took no part in the decision of this case.

Syllabus

WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. *v.* BENTEX PHARMACEUTICALS, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 72–555. Argued April 17, 1973—Decided June 18, 1973

Respondent drug marketers filed suit for a declaratory judgment that their drugs containing pentylenetetrazol are generally recognized as safe and effective and thus are not "new drugs" within the meaning of § 201 (p) of the Federal Food, Drug, and Cosmetic Act of 1938, as amended. They also sought exemption under § 107 (c)(4), the grandfather clause, of the 1962 amendments to the Act. The Food and Drug Administration (FDA) Commissioner, based on NAS–NRC panel reports, concluded that there was a lack of substantial evidence that the drugs were effective for their intended uses and gave notice of his intention to initiate proceedings to withdraw approval of the new drug applications (NDA's). In light of FDA's position that withdrawal of approval of an NDA would operate to remove marketing approval for all drugs of similar composition, known as "me-too" drugs, whether or not expressly covered by an effective NDA, the Commissioner invited holders of NDA's for drugs containing pentylenetetrazol "and any interested person who might be adversely affected by their removal from the market" to submit "adequate and well-controlled studies" to establish the effectiveness of the drugs. Only one NDA holder submitted further evidence, which the Commissioner held did not satisfy the statutory standard. He gave notice of intent to issue an order withdrawing approval of the NDA's, and only one NDA holder requested a hearing but filed no supporting data. The Commissioner issued orders withdrawing approval of the NDA's and no appeal was taken. Respondents here all market "me-too" drugs, none of which was expressly covered by an effective NDA. The District Court held that FDA should resolve the "new drug" and "grandfather" issues in an administrative proceeding. The Court of Appeals reversed and remanded with directions to the District Court to determine whether the challenged drugs may lawfully be marketed without approved NDA's, holding that FDA has no juris-

diction, primary or concurrent, to decide what is a "new drug" for which an NDA is required. *Held:* The District Court's referral of the "new drug" and "grandfather" issues to FDA was proper. Pp. 649–654.

(a) While an FDA order denying an NDA and withdrawing one is reviewable by the Court of Appeals under § 505 (h), an order declaring a "new drug" status under § 201 (p) is reviewable under the Administrative Procedure Act by the District Court. Pp. 651–652.

(b) The reach of scientific inquiry under both § 505 (d) and § 201 (p) is the same, *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, *ante*, p. 609, and it is implicit in the regulatory scheme that FDA has jurisdiction to decide with administrative finality, subject to judicial review, the "new drug" status of individual drugs or classes of drugs. Pp. 652–653.

(c) The "new drug" and "grandfather" issues are peculiarly suited to initial determination by FDA with its specialized competence and expertise. Pp. 653–654.

463 F. 2d 363, reversed.

DOUGLAS, J., delivered the opinion of the Court, in which all Members joined, except BRENNAN, J., who took no part in the consideration or decision of the case, and STEWART, J., who took no part in the decision of the case.

Deputy Solicitor General Friedman argued the cause for petitioners. On the briefs were *Solicitor General Griswold, Assistant Attorney General Kauper, Deputy Solicitor General Wallace, Andrew L. Frey, Howard E. Shapiro, George Edelstein,* and *Peter Barton Hutt.*

George F. Townes argued the cause for respondents. With him on the brief were *Sol E. Abrams* and *C. Ben Bowen.**

**Bruce J. Terris, Joseph Onek,* and *Peter H. Schuck* filed a brief for American Public Health Assn. et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Lloyd N. Cutler, Daniel Marcus,* and *William T. Lake* for Pharmaceutical Manufacturers Assn., and by *Thomas D. Finney, Jr., Thomas Richard Spradlin,* and *Daniel F. O'Keefe, Jr.,* for the Proprietary Assn.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

In this case Bentex and some 20 other firms that market drugs containing pentylenetetrazol filed this suit for a declaratory judgment that their drugs containing pentylenetetrazol are generally recognized as safe and effective, and thus not "new drugs" within the meaning of § 201 (p)(1) of the Federal Food, Drug, and Cosmetic Act of 1938, as amended, 76 Stat. 781, 21 U. S. C. § 321 (p)(1). They also sought exemption from the new effectiveness requirements by reason of § 107 (c)(4) of the 1962 amendments to the Act, known as the "grandfather" clause.

As part of the Food and Drug Administration's (FDA's) Drug Efficacy Study Implementation program, three separate National Academy of Sciences-National Research Council (NAS–NRC) panels reviewed the evidence concerning these drugs, and each concluded that the drug was "ineffective" for the indicated use. The Commissioner concluded there was a lack of substantial evidence that these drugs were effective for their intended uses and gave notice of his intention to initiate proceedings to withdraw approval of the new drug applications (NDA's). FDA had taken the position that withdrawal of approval of an NDA would operate to remove marketing approval for all drugs of similar composition, known as "me-too" drugs, whether or not they were expressly covered by an effective NDA.[1] Accord-

[1] Volume 37 Fed. Reg. 23187, adding § 130.40 to 21 CFR, defines "identical, related, or similar drug" as used in this Act to include "other brands, potencies, dosage forms, salts, and esters of the same drug moiety as well as of any drug moiety related in chemical structure or known pharmacological properties." It also provides all persons with an interest in such drugs an opportunity for hearing on any proposed withdrawal of NDA approval for the basic drug. A district court order directing FDA to apply the NAS–NRC evaluation to all "me-too" drugs is reproduced in 37 Fed. Reg. 26623–26624.

ingly, the notice invited the holders of the NDA's for drugs containing pentylenetetrazol, "and any interested person who might be adversely affected by their removal from the market," to submit "adequate and well-controlled studies" to establish the effectiveness of the drugs. See § 505 (d), 21 U. S. C. § 355 (d). Only one NDA holder submitted further evidence, which the Commissioner held did not satisfy the statutory standard. He thereupon gave notice of intent to issue an order withdrawing approval of the NDA's under § 505 (e), 21 U. S. C. § 355 (e). Again, all those who might be adversely affected by withdrawal of the NDA's were given the opportunity to participate. Only one NDA holder requested a hearing but filed no data to support it. The Commissioner issued orders withdrawing approval of the three NDA's (35 Fed. Reg. 14412); no appeal was taken. This suit in the District Court followed. It appears that all of the parties to this suit market "me-too" drugs, none of which was expressly covered by an effective NDA.

The District Court held that although it could determine whether the drugs were "new" or "grandfathered" drugs, its jurisdiction was concurrent with that of FDA and that FDA should resolve the "new drug" issue in an administrative proceeding. It entered an injunction to preserve the status quo and ruled that if FDA should decline to hold a hearing it would determine the issue. The Court of Appeals reversed and remanded with directions that the District Court determine whether the challenged drugs may lawfully be marketed without approved NDA's. 463 F. 2d 363. It held that FDA has no jurisdiction, either primary or concurrent, to decide in an administrative proceeding what is a "new drug" for which an NDA is required. In its view the 1962 Act established two forums for the regulation of drugs: an administrative one for premarketing clear-

ances for "new drugs" or withdrawal of previously approved NDA's, with the right of appeal; and, second, a judicial one for enforcement of the requirement that "new drugs" be cleared as safe and effective before marketing by providing the Government with judicial remedies of seizure, injunction, and criminal prosecution available solely in the District Court. *Id.*, at 371–372.

We reverse the Court of Appeals.

FDA, as a result of an NAS–NRC study and after due notice, faced up to the problem of proposing withdrawal of drugs found to be lacking in substantial evidence of effectiveness. One method would be to have 1,000 withdrawal hearings—perhaps as many as 3,500, each one lasting probably for weeks. The cost in time and budget would be enormous. Accordingly, FDA issued regulations,[2] already discussed in *Weinberger* v. *Hynson, Westcott & Dunning, Inc., ante,* p. 609, defining the "scientific principles which characterize an adequate and well-controlled clinical investigation," [3] which elaborates on the statutory "substantial evidence" test. And, as we held in *Hynson,* no basis for a hearing under these regulations would be laid unless a party seeking a hearing proffered at least some evidence of that nature and quality.

By May 1972, 102 final orders effecting withdrawal of approval for 452 NDA's had been issued; and they resulted in the removal from the market of an additional 1,473 "me-too" drugs.[4] FDA was still troubled because under the 1962 Act no census of the marketplace was authorized. That is why Congress enacted the Drug

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[2] 35 Fed. Reg. 3073 and 7250.

[3] See the Appendix in *Hynson, ante,* p. 634.

[4] Hearings on the Present Status of Competition in the Pharmaceutical Industry before the Subcommittee on Monopoly of the Senate Select Committee on Small Business, 92d Cong., 2d Sess., pt. 22, p. 8525.

Listing Act of 1972, 86 Stat. 559, 21 U. S. C. §§ 331 (p), 335 (e), 360 (e), (f), (c), (d) (1970 ed., Supp. II). That Act requires manufacturers to submit to FDA a list of all drugs they market, including data showing their composition, labeling, and advertising.[5] The Senate Report stated: [6]

> "The effective enforcement of the drug provisions of the Act requires the ready availability of a current inventory of all marketed drugs. The Secretary is just completing a thorough review of the effectiveness of drugs marketed pursuant to new drug applications during the period 1938–1962, as required by the Drug Amendments of 1962. Application of the results of this important review to related drugs would be frustrated if a list of all marketed drugs were not easily obtained."

FDA also realized that it is impossible to apply the 1962 amendments to over-the-counter (OTC) drugs on a case-by-case basis. There are between 100,000 and 500,000 of these products, few of which were previously approved by FDA. In May 1972 FDA adopted a procedure for determining whether particular OTC products, not covered by NDA's are safe products, not ineffective, and not misbranded. 37 Fed. Reg. 9464. The procedure involves the establishment of independent expert panels for different categories of OTC drugs (*e. g.*, antacids, laxatives, analgesics) which would review all available data and prepare monographs prescribing drug composition, labeling, and manufacturing controls. OTC's conforming to the monograph will not be considered either misbranded or a "new drug" requiring an NDA. The regulation provides for a hearing before the expert panel, comments and rebuttal comments on the monograph, and

[5] Filings are due in June 1973. 37 Fed. Reg. 26432.

[6] S. Rep. No. 92-924, p. 2.

finally a hearing before the Commissioner and judicial review. *Id.*, at 9475.

This case, like the cross-petition in the *Hynson* case (No. 72–414) raises the question whether FDA has authority to decide in an administrative hearing whether a drug satisfies the new effectiveness requirements of the Act. As noted, the Commissioner ordered that three NDA's for the drugs in question be withdrawn. Review of the order was not sought in the Court of Appeals as provided in § 505 (h), 21 U. S. C. § 355 (h). Rather, the aggrieved manufacturers of "me-too" drugs filed suit in the District Court, with the results we have already detailed. The narrow question is whether the FDA may decide whether a drug is a "new drug" on referral from a district court.

As already noted, an order denying an NDA or withdrawing one is reviewable by the Court of Appeals, § 505 (h); and we see no reason why Congress could not make one method of review the exclusive one. Certainly an order that does not deny or withdraw an NDA is reviewable under the Administrative Procedure Act, if it declares a "new drug" status. See *Hynson, supra,* at 627. In bolstering that conclusion we should note in passing that *Abbott Laboratories* v. *Gardner,* 387 U. S. 136, 144, said that the provisions stated in this Act for judicial review do not manifest "a congressional purpose to eliminate judicial review of other kinds of agency action." While § 505 (h) would appear to be the exclusive method of obtaining judicial review of FDA's order withdrawing an NDA covering the instant drugs, the Government apparently did not oppose the District Court's taking jurisdiction, or appeal from its action, and presents no objection to the exercise by the courts of jurisdiction in this case. It does, however, strenuously oppose the conclusions reached by the Court of Appeals.

That court, in holding that FDA has no jurisdiction to determine the "new drug" status of a drug, stated that the question of "new drug" status is never presented when an application of a manufacturer for approval is filed. Parties, of course, cannot confer jurisdiction; only Congress can do so. The line sought to be drawn by the Court of Appeals is FDA action on NDA's pursuant to § 505 (d) and § 505 (e), on the one hand, and the question of "new drug" determination on the other. We can discern no such jurisdictional line under the Act. The FDA, as already stated, may deny an NDA where there is a lack of "substantial evidence" of the drug's effectiveness, based, as we have outlined, on clinical investigation by experts. But the "new drug" definition under § 201 (p) encompasses a drug "not generally recognized, among experts qualified by scientific training and experience to evaluate the safety and effectiveness of drugs, as safe and effective for use." Whether a particular drug is a "new drug," depends in part on the expert knowledge and experience of scientists based on controlled clinical experimentation and backed by substantial support in scientific literature. One function is not peculiar to judicial expertise, the other to administrative expertise. The two types of cases overlap and strongly suggest that Congress desired that the administrative agency make both kinds of determination. Even where no such administrative determination has been made and the issue arises in a district court in enforcement proceedings, it would be commonplace for the court to await an appropriate administrative declaration before it acted. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51; *FPC* v. *Louisiana Power & Light Co.*, 406 U. S. 621, 647. It may, of course, be true that in some cases general recognition that a drug is efficacious might be made without the kind of scientific support necessary to

obtain approval of an NDA. But, as we indicate in *Hynson, supra,* at 631, the reach of scientific inquiry under both § 505 (d) and § 201 (p) is precisely the same.

We think that it is implicit in the regulatory scheme, not spelled out *in haec verba,* that FDA has jurisdiction to decide with administrative finality, subject to the types of judicial review provided, the "new drug" status of individual drugs or classes of drugs. The deluge of litigation that would follow if "me-too" drugs and OTC drugs had to receive *de novo* hearings in the courts would inure to the interests of manufacturers and merchants in drugs, but not to the interests of the public that Congress was anxious to protect by the 1962 amendments, as well as OTC drugs and drugs covered by the 1972 Act. We are told that FDA is incapable of handling a caseload of more than perhaps 10 or 15 *de novo* judicial proceedings in a year. Clearly, if FDA were required to litigate, on a case-by-case basis, the "new drug" status of each drug now marketed, the regulatory scheme of the Act would be severely undermined, if not totally destroyed. Moreover, a case-by-case approach is inherently unfair because it requires compliance by one manufacturer while his competitors marketing similar drugs remain free to violate the Act. In a case much more clouded with doubts than this one, we held that we would not "in the absence of compelling evidence that such was Congress' intention . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes." *Permian Basin Area Rate Cases,* 390 U. S. 747, 780. And see *Ricci* v. *Chicago Mercantile Exchange,* 409 U. S. 289, 304–306.

We conclude that the District Court's referral of the "new drug" and the "grandfather" issues to FDA was appropriate, as these are the kinds of issues peculiarly suited to initial determination by the FDA. As the District Court said: "Evaluation of conflicting reports as to

the reputation of drugs among experts in the field is not a matter well left to a court without chemical or medical background." The determination whether a drug is generally recognized as safe and effective within the meaning of § 201 (p)(1) necessarily implicates complex chemical and pharmacological considerations. Threshold questions within the peculiar expertise of an administrative agency are appropriately routed to the agency, while the court stays its hand. As we stated in *Far Eastern Conference* v. *United States*, 342 U. S. 570, 574–575: "[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." And see *Port of Boston Marine Terminal Assn.* v. *Rederiaktiebolaget Transatlantic*, 400 U. S. 62, 68; *Ricci* v. *Chicago Mercantile Exchange*, *supra*, at 304–306.

Reversed.

MR. JUSTICE BRENNAN took no part in the consideration or decision of this case. MR. JUSTICE STEWART took no part in the decision of this case.

Syllabus

USV PHARMACEUTICAL CORP. *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 72–666. Argued April 17, 1973—Decided June 18, 1973

Petitioner sells drug products containing citrus bioflavonoid, an extract from fruit skins, as a principal active ingredient. In the 1950's new drug applications (NDA's) were filed and became effective for seven products, and two were sold without any NDA. After the enactment of the 1962 amendments to the Federal Food, Drug, and Cosmetic Act, these products, together with a large number of other bioflavonoid products were examined by the Food and Drug Administration (FDA) for effectiveness. Based upon National Academy of Sciences-National Research Council (NAS–NRC) reports and its own evaluation, FDA gave notice of opportunity for hearing on its proposal to withdraw approvals of NDA's for all drugs containing these compounds, alone or in combination with other drugs. Petitioner then brought suit in the District Court, seeking a declaratory judgment that its drugs are exempt from the efficacy requirements under § 107 (c) (4), the so-called "grandfather" clause. FDA refused a stay pending the judicial proceedings and went forward with its administrative action. Petitioner submitted no evidence of "adequate and well-controlled investigations" as required by § 505 (d) to support its claims of effectiveness, and FDA withdrew petitioner's NDA's. Section 107 (c) (4) exempts from the effectiveness requirements any drug which on the day preceding the 1962 enactment (1) was commercially used or sold in the United States, (2) was not a "new drug" as defined in the 1938 Act, and (3) "was not covered by an effective application" for a new drug under the 1938 Act. The District Court found that two of the products had never been covered by effective NDA's and that, while seven had been covered, their applications had later been withdrawn by petitioner. It concluded that petitioner's drugs were not covered by effective applications, and hence were exempt from the effectiveness criterion. The Court of Appeals reversed on the merits. It held that petitioner's drugs were not entitled to an exemption, that an applicant could not withdraw an NDA once

it became effective, that the drugs were "covered by an effective application," and that although "me-too" drugs (similar drugs) of other manufacturers would be exempt, petitioner's "me-too's" were not exempt. *Held:*

1. "Any drug" is used in § 107 (c) (4) in the generic sense, which means that the "me-too's" whether the products of the same or of different manufacturers "covered" by an "effective" NDA are not exempt from the efficacy requirement of § 201 (p). Pp. 663–665.

2. Prescription drugs on the market are subject to the 1962 efficacy requirements, for if the 1962 amendments are to be comprehensively meaningful, § 107 (c) (4) cannot be read so as to provide a loophole to permit the marketing of drugs previously subject to new drug regulation without demonstrating by the new statutory standards that they have the claimed efficacy. Pp. 665–666.

3. The congressional purpose was to exempt only those drugs that never had been subject to the new drug regulation, and therefore any drug for which an NDA had once been effective does not fall within the exempt category. Pp. 666–668.

461 F. 2d 223, affirmed.

DOUGLAS, J., delivered the opinion of the Court, in which all Members joined, except BRENNAN, J., who took no part in the consideration or decision of the case, and STEWART, J., who took no part in the decision of the case.

Joel E. Hoffman argued the cause for petitioner. With him on the briefs were *Robert L. Wald, Selma M. Levine, Philip Elman,* and *Philip J. Franks.*

Deputy Solicitor General Friedman and *Andrew L. Frey* argued the cause for respondents. With *Mr. Frey* on the briefs were *Solicitor General Griswold, Assistant Attorney General Kauper, Deputy Solicitor General Wallace, Howard E. Shapiro,* and *Peter Barton Hutt.**

**Lloyd N. Cutler, Daniel Marcus,* and *William T. Lake* filed a brief for Pharmaceutical Manufacturers Assn. as *amicus curiae* urging reversal.

Bruce J. Terris, Joseph Onek, and *Peter H. Schuck* filed a brief

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner sells a line of drugs containing, as a principal active ingredient, citrus bioflavonoid, which is an extract from fruit skins. The drugs are sold in capsules, syrup, and tablets. In the 1950's new drug applications (NDA's) were filed and became effective for seven of them; two, however, were sold without any NDA. In 1961 the Food and Drug Administration (FDA) advised petitioner that two of the products, when distributed under the existing labels, were not new drugs. These drugs were recommended for a wide variety of ailments from bleeding, to hypertension, to ulcerative colitis. After the 1962 amendments to the Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040, as amended, 76 Stat. 780, these products, together with a large number of other bioflavonoid products, were examined by FDA for drug effectiveness. The National Academy of Sciences-National Research Council (NAS–NRC) panels reviewed them. One panel on metabolic disorders concluded that the "use of these materials as hemostatic agents for capillary fragility is felt to be unjustifiable and not proved." A panel on hematologic disorders found there was no proof that these products were efficacious for any medical use.

Based upon the NAS–NRC reports and its own evaluation, FDA gave notice of opportunity for hearing on its proposal to withdraw approvals of NDA's for all drugs containing these compounds, alone or in combination with other drugs. Petitioner thereupon brought suit in the District Court, asking for a declaratory judgment that its drugs are exempt from the efficacy requirements under

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for American Public Health Assn. et al. as *amici curiae* urging affirmance.

Thomas D. Finney, Jr., *Thomas Richard Spradlin*, and *Daniel F. O'Keefe, Jr.*, filed a brief for the Proprietary Assn. as *amicus curiae*.

§ 107 (c)(4). The administrative proceedings went forward, FDA refusing a stay pending the judicial proceedings. Petitioner submitted no evidence of "adequate and well-controlled investigations" as required by § 505 (d) of the Act, 21 U. S. C. § 355 (d), to support its claims of effectiveness. The Commissioner made findings and withdrew petitioner's NDA's.

In the District Court petitioner contended that the drugs were exempt from regulation by reason of § 107 (c)(4) of the 1962 amendments, which provides:

> "In the case of any drug which, on the day immediately preceding the enactment date, (A) was commercially used or sold in the United States, (B) was not a new drug as defined by section 201(p) of the basic Act as then in force, and (C) was not covered by an effective application under section 505 of that Act, the amendments to section 201 (p) made by this Act shall not apply to such drug when intended solely for use under conditions prescribed, recommended, or suggested in labeling with respect to such drug on that day."

The District Court found that two of the products had never been covered by effective NDA's and that, while seven had been covered, their applications had later been withdrawn by petitioner. It found that the products were "safe" for use in treating abnormal capillary permeability and fragility. It therefore concluded that, as of the day the 1962 amendments became effective, petitioner's products were not new drugs, were not covered by effective applications within the meaning of § 107 (c)(4), and hence were exempt from the effectiveness criterion added to the regulatory provisions of §§ 505 and 201 (p), 21 U. S. C. §§ 355 and 321 (p). In so ruling,

the District Court necessarily determined that it, and not FDA, had jurisdiction to decide exemption questions.

The Court of Appeals agreed that the District Court alone had jurisdiction but reversed on the merits.[1] 461 F. 2d 223. It held that none of petitioner's bioflavonoid drugs were entitled to exemption under § 107 (c)(4). As to the seven for which NDA's had been filed, it held that an applicant could not withdraw an NDA once it became effective. It concluded that even if the drugs were generally recognized as safe on the day preceding the effective date of the 1962 Act, they were "covered by an effective application" within the meaning of § 107 (c)(4)(C) and thus were not exempt from the 1962 amendments. As to the "me-too" drugs, those specific drugs for which petitioner had not filed an NDA, the Court of Appeals held that although the "me-too's" of other manufacturers competing with petitioner's bioflavonoids would be exempt, petitioner's "me-too's" were not exempt because the NDA's covering the pioneer drugs prepared by petitioner covered all of its products similar in formula and labeling. While the Government agrees that peti-

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[1] Unlike the situation in *CIBA Corp.* v. *Weinberger, ante,* p. 640, the order of the Commissioner withdrawing petitioner's NDA's had not become final prior to the District Court's assuming jurisdiction. In fact, the Court of Appeals for the District of Columbia Circuit reversed the Commissioner's decision, 151 U. S. App. D. C. 284, 466 F. 2d 455, and the proceedings on remand are now pending before the Commission. Thus, petitioner was not barred from proceeding in the District Court. Cf. *CIBA Corp.* v. *Weinberger, supra.* Our decision today is not meant to indicate that the District Court, had it concluded that its jurisdiction was concurrent with that of FDA, would not have abused its discretion in refusing to stay this action pending the outcome of administrative proceedings. Cf. *Weinberger* v. *Bentex Pharmaceuticals, Inc., ante,* p. 645. The Court of Appeals below found it unnecessary to consider whether petitioner had failed to exhaust its administrative remedies. 461 F. 2d, at 226.

tioner's "me-too" products should be accorded the same treatment as the "me-too's" of other manufacturers who had never filed NDA's, the parties are at odds on other issues.[2]

The resolution of the questions presented turns essentially on the meaning of § 107 (c)(4), quoted above. But as background for the problem of construction, references should be made to other 1962 amendments. Section 201 (p) [3] was amended to redefine a "new drug" as one not generally recognized by experts as both safe and effective for use under the conditions prescribed or one that has not been used to a material extent and for a material time. Section 505 (a) was amended to require affirmative approval of FDA, where previously it

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[2] There lurks in the case a question whether a drug could have been unsafe prior to the 1962 amendments because it was ineffective in treating the conditions for which its use was recommended by the label. That question, however, was not presented in the petition for certiorari.

[3] "The term 'new drug' means—

"(1) Any drug (except a new animal drug or an animal feed bearing or containing a new animal drug) the composition of which is such that such drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety and effectiveness of drugs, as safe and effective for use under the conditions prescribed, recommended, or suggested in the labeling thereof, except that such a drug not so recognized shall not be deemed to be a 'new drug' if at any time prior to the enactment of this chapter it was subject to the Food and Drugs Act of June 30, 1906, as amended, and if at such time its labeling contained the same representations concerning the conditions of its use; or

"(2) Any drug (except a new animal drug or an animal feed bearing or containing a new animal drug) the composition of which is such that such drug, as a result of investigations to determine its safety and effectiveness for use under such conditions, has become so recognized, but which has not, otherwise than in such investigations, been used to a material extent or for a material time under such conditions." 21 U. S. C. § 321 (p).

had provided that an NDA would automatically become effective unless a contrary order were issued.[4] Section 505 (d) [5] was amended to require disapproval of an appli-

[4] Section 505 (c) provides:

"Within one hundred and eighty days after the filing of an application under this subsection, or such additional period as may be agreed upon by the Secretary and the applicant, the Secretary shall either—

"(1) approve the application if he then finds that none of the grounds for denying approval specified in subsection (d) applies, or

"(2) give the applicant notice of an opportunity for a hearing before the Secretary under subsection (d) . . . on the question whether such application is approvable. If the applicant elects to accept the opportunity for hearing by written request within thirty days after such notice, such hearing shall commence not more than ninety days after the expiration of such thirty days unless the Secretary and the applicant otherwise agree. Any such hearing shall thereafter be conducted on an expedited basis and the Secretary's order thereon shall be issued within ninety days after the date fixed by the Secretary for filing final briefs." 21 U. S. C. § 355 (c).

[5] That section provides:

"If the Secretary finds, after due notice to the applicant in accordance with subsection (c) . . . and giving him an opportunity for a hearing, in accordance with said subsection, that (1) the investigations, reports of which are required to be submitted to the Secretary pursuant to subsection (b) . . . , do not include adequate tests by all methods reasonably applicable to show whether or not such drug is safe for use under the conditions prescribed, recommended, or suggested in the proposed labeling thereof; (2) the results of such tests show that such drug is unsafe for use under such conditions or do not show that such drug is safe for use under such conditions; (3) the methods used in, and the facilities and controls used for, the manufacture, processing, and packing of such drug are inadequate to preserve its identity, strength, quality, and purity; (4) upon the basis of the information submitted to him as part of the application, or upon the basis of any other information before him with respect to such drug, he has insufficient information to determine whether such drug is safe for use under such conditions; or (5) evaluated on the basis of the information submitted to him as part of the application and any other information before him with respect to such drug, there is a lack of substantial evidence

cation if there is "a lack of substantial evidence that the drug will have the effect it purports or is represented to have." Section 505 (e) was amended to require that any previous approval of an application be withdrawn whenever it appears from new information or otherwise that there is a lack of substantial evidence of the drug's effectiveness.

There remained the problem of the application of the new drug efficacy provisions to drugs already on the market. Without transitional protection all drugs—except those marketed prior to the 1938 Act whose labeling had not been changed and which were exempt from the "new drug" provision of § 201 (p)—would have been in violation of the amended Act unless generally recognized as effective. Even NDA's which were outstanding would have become ineffective because FDA had not approved them under the new criteria. Section 107 (c) (2) of the amendments therefore provides that applications which were effective on the day before the enactment date of the 1962 amendments should be deemed "approved." Section 107 (c)(2) thus eliminated the

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that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the proposed labeling thereof; or (6) based on a fair evaluation of all material facts, such labeling is false or misleading in any particular; he shall issue an order refusing to approve the application. If, after such notice and opportunity for hearing, the Secretary finds that clauses (1) through (6) do not apply, he shall issue an order approving the application. As used in this subsection and subsection (e) . . . , the term 'substantial evidence' means evidence consisting of adequate and well-controlled investigations, including clinical investigations, by experts qualified by scientific training and experience to evaluate the effectiveness of the drug involved, on the basis of which it could fairly and responsibly be concluded by such experts that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the labeling or proposed labeling thereof." 21 U. S. C. § 355 (d).

necessity to review and approve every application already on file.

Section 107 (c)(3) provides that drugs covered by NDA's already on file whose labeling remains unchanged are not affected by the amended provisions of § 505 (b) or by approvals or refusals under § 505 (d) insofar as the effectiveness of the drugs is concerned, so long as the application is not withdrawn or suspended under § 505 (e). It also provides that the new effectiveness requirement in the withdrawal provision would not apply until two years after the amendments were adopted, or until the NDA approval were withdrawn for reasons other than lack of the drug's effectiveness, whichever came first. It seems apparent that by reason of § 107 (c)(3) the industry was assured it could continue to market previously approved NDA's unless and until the NDA was withdrawn and that before such withdrawal they would be given a minimum of two years within which to submit "substantial evidence" to support the claims for their products.

Section 107 (c)(4) exempted drugs from the new effectiveness requirements so long as their composition and labeling remained unchanged. This exemption, however, applies only to a product that, on the day before the 1962 amendments became effective, (A) was used or sold commercially in the United States, (B) was generally recognized by the experts as safe; and (C) was not "covered" by an "effective" application.

The first question is, which "me-too" copies of an NDA drug are subject to the efficacy requirements to the same extent as the NDA product itself? Are only the "me-toos" of the same manufacturer "covered" by an effective application within the meaning of § 107 (c)(4)(C) and thus not exempt from § 201 (p) or are no "me-too's" exempt whoever manufactures them? It seems clear that § 107 (c) was designed in general to make the new

1962 requirements applicable to drugs then on the market after a two-year grace period. Section 107 (c)(4) created an exception from this general policy. Senator Eastland explained these "transitional provisions," stating: "Established drugs which have never been required to go through new drug procedures will not be affected by the new effectiveness test insofar as their existing clauses are concerned." [6] It is true that an NDA covers a particular product or products that it names and that § 505 when applied to an NDA is personal to the manufacturer who files it. Section 505, in other words, addresses itself to drugs as individual products. But we agree with the Government that "any drug" when used in § 107 (c)(4) is used in the generic sense, which means that the "me-too's," whether products of the same or of different manufacturers "covered" by an "effective" NDA, are not exempt from the efficacy requirements of § 201 (p). If that were not true, then, as the Court of Appeals said, the "me-too's" of one manufacturer covered by an NDA of another manufacturer would be exempt from regulation, while the "me-too's" of the manufacturer holding the NDA could be regulated. That seems to be a reading of § 107 (c)(4) that is discriminatory and needlessly so. For it is avoided by taking "any drug" in that subsection as a generic term. The transitional nature of § 107 (c) works in that direction. A reading to exclude all "me-too" drugs from the word "covered" as used in § 107 (c)(4) would create a hiatus in the regulatory scheme for which there seems to be no cogent reason. We find no persuasive reason to resolve the ambiguities in favor of the manufacturers so that pre-existing pioneer drugs would be subject to the new efficacy requirements but the "me-too's" which often do equal service for them would escape

[6] 108 Cong. Rec. 17366.

the thrust of the 1962 amendments. That resolution of the ambiguities would largely leave pre-1962 drugs of unproved effectiveness untouched by the 1962 amendments and perpetuate a competitive contest in the marketing of ineffective pre-1962 drugs. FDA would, of course, have authority to pursue that category of drugs under the misbranding provisions of the Act. But that slow, cumbersome method is utterly unsuited to the need. We decline to attribute such a self-defeating purpose to the Congress. After all, the 1962 regulatory scheme proposes administrative control through an expert agency in lieu of the more cumbersome 1938 devices, as a result of which, "good medical practice is hampered, and the consumer is misled until, perhaps years later, the Government has gathered the necessary evidence to sustain its burden of proving the violation in court." [7]

Petitioner, focusing on prescription drugs,[8] contends that the construction of § 107 (c)(4) urged by the Government would make the exemption meaningless. Prescription drugs, as FDA points out, are not likely to have come on the market subsequent to 1938 without being a "new drug" for some time. But the over-the-counter (OTC) drugs, known as the proprietaries, are often made up of old, established ingredients. Such products, coming on the market for the first time between 1938 and 1962, might never have been subject to new drug regulation. If so, they would be entitled to the exemption provided by § 107 (c)(4). Senator Kefauver, the main

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[7] H. R. Rep. No. 2464, 87th Cong., 2d Sess., p. 3.

[8] Prescription drugs, as defined by § 503 (b), 21 U. S. C. § 353 (b), include any drug for human use which (A) is habit forming; (B) "because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug"; or (C) is limited to prescription use in the application under § 505.

sponsor of the 1962 Act, deplored the absence in an earlier bill of the failure to submit proprietaries on the market to tests of efficacy. He said:

> "Effectiveness, as well as safety, should apply to new proprietary drugs, but proprietaries now on the market are not to be subject under the present bill to the provisions requiring them, upon notice by the FOA [*sic*], to support their claims for effectiveness. I think they should be so required. That is a matter which can be remedied in conference or by other legislation." [9]

It can be inferred from this statement that prescription drugs on the market were to be subjected to the efficacy requirements. If the 1962 amendments are to be comprehensively meaningful, we decline to read § 107 (c)(4) so as to provide a loophole so that the manufacturers can go on marketing drugs previously subject to new drug regulation without demonstrating by the new statutory standards that they are effective as claimed.

The second question presented by this case is whether an applicant could have withdrawn or "deactivated" an NDA prior to the 1962 amendments so that its drug was no longer "covered by an effective application" and thus is now exempt from efficacy regulation by reason of § 107 (c)(4). Petitioner in 1961 had stated in a letter to the Director of New Drug Branch of the Bureau of Medicine in FDA that "[i]t is our recollection that the C. V. P. class of products were no longer considered to be new drugs . . . ." Petitioner in 1961 also stopped filing supplemental information as required by regulation with regard to the products for which NDA's had become effective. It claims that these acts were sufficient to

[9] 108 Cong. Rec. 17368.

withdraw the NDA's and to bring its products within the exemption.

Initially, we repeat that the legislative history indicates that it was Congress' purpose to exempt only those drugs that never had been subject to the new drug regulation.[10] Quite obviously, any drug for which an NDA once had been effective does not fall within that category.

Congress rejected an approach that would have exempted from the efficacy requirements of the 1962 amendments all drugs then marketed which had become generally recognized as safe. It now would be irrational for us to construe § 107 (c)(4) of the amendments to exempt a drug merely because the manufacturer had taken some formal steps totally unrelated to the drug's effectiveness to indicate that the drug was no longer a "new drug" under the pre-1962 standards. The result would be that some drugs for which an NDA had been filed would be subject to the efficacy requirements and some would not, even though one could not differentiate between the drugs on the grounds of effectiveness. For example, 43 NDA's had been filed with respect to bioflavonoids and related compounds. There is no reason to believe that any product is more or less effective than another. According to the Solicitor General, the "state of activity, inactivity, or withdrawal" of the applications varied from one to the next when the 1962 amendments became effective. It would be totally inconsistent with the statutory scheme and the policy underlying the 1962 amendments, as well as patently unjust, to conclude that some manufacturers could continue to market their bioflavonoid products, but others could not. We cannot attribute such

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[10] See S. Rep. No. 1744, 87th Cong., 2d Sess., pt. 2, p. 8; H. R. Rep. No. 2464, 87th Cong., 2d Sess., 12; H. R. Rep. No. 2526, 87th Cong., 2d Sess., 22–23; 108 Cong. Rec. 17366.

an intention to Congress and, accordingly, cannot agree with petitioner that its NDA's had been withdrawn prior to 1962 so that its bioflavonoid products were no longer "covered by an effective application."

Affirmed.

MR. JUSTICE BRENNAN took no part in the consideration or decision of this case. MR. JUSTICE STEWART took no part in the decision of this case.

Syllabus

UNITED STATES ET AL. *v.* STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (SCRAP) ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 72-535. Argued February 28, 1973—Decided June 18, 1973*

The Interstate Commerce Act permits railroads to file proposed freight rate increases, with at least 30 days' notice to the Interstate Commerce Commission (ICC) and the public before putting the new rates into effect. The ICC may, pursuant to § 15 (7) of the Act, suspend the operation of the proposed rates for as long as seven months, in order to investigate the lawfulness of the rates. At the end of the seven-month period, the carrier may put the suspended rates into effect unless the ICC has completed its investigation and found the rates unlawful. Proceeding under the statutory scheme, substantially all the Nation's railroads sought a 2.5% surcharge on nearly all freight rates, as an emergency measure to obtain increased revenues pending adoption of selective rate increases on a permanent basis. Shippers, competing carriers, and other interested persons requested the ICC to suspend the tariff for the statutory seven-month period. Various environmental groups, including Students Challenging Regulatory Agency Procedures (SCRAP) and the Environmental Defense Fund, appellees here, protested that failure to suspend the surcharge would cause their members "economic, recreational and aesthetic harm," and specifically, that the new rate structure would discourage the use of "recyclable" materials and promote the use of raw materials that compete with scrap, thus adversely affecting the environment. On February 1, 1972, the ICC issued an order announcing its decision not to suspend the surcharge for the seven-month period, and on April 24, 1972, ordered the proposed selective increases filed by the carriers to be suspended for the full seven-month period ending November 30, 1972, and permitted the collection of the surcharge until that date. SCRAP filed the

*Together with No. 72-562, *Aberdeen & Rockfish Railroad Co. et al.* v. *Students Challenging Regulatory Agency Procedures (SCRAP) et al.*, also on appeal from the same court.

present suit seeking, *inter alia*, an injunction to restrain enforcement of the February 1 and April 24 orders allowing the carriers to collect the surcharge. SCRAP, an unincorporated association formed by five law students to enhance the quality of the environment, claimed that its members "suffered economic, recreational and aesthetic harm directly as a result of the adverse environmental impact of the railroad freight structure," that each of its members was caused to pay more for finished products, that each of its members uses the forests, rivers, mountains, and other natural resources of the Washington, D. C., area and at his legal residence for camping, hiking, fishing, and other purposes, and that these uses have been adversely affected by increased freight rates. The main thrust of SCRAP's complaint was that the ICC's orders were unlawful for failure to include a detailed environmental impact statement as required by § 102 (2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U. S. C. § 4332 (2)(C). The three-judge District Court found that appellees had standing to sue. The court held that its power to grant an injunction was not barred by *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658, because NEPA "implicitly confers authority on the federal courts to enjoin *any* federal action taken in violation of NEPA's procedural requirements . . . so long as the review is confined to a determination as to whether the procedural requisites of NEPA have been followed." The court concluded that the ICC's decision not to suspend the surcharge for the seven-month period was a "major federal action significantly affecting the quality of the human environment," and granted an injunction prohibiting the ICC "from permitting" and the railroads "from collecting" the surcharge "insofar as that surcharge relates to goods being transported for purposes of recycling." *Held:*

1. Appellees' pleadings sufficiently alleged that they were "adversely affected" or "aggrieved" within the meaning of § 10 of the Administrative Procedure Act to withstand a motion to dismiss on the ground of lack of standing to sue. *Sierra Club* v. *Morton*, 405 U. S. 727, distinguished. Pp. 683–690.

(a) Standing is not confined to those who show economic harm, as "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society." *Sierra Club, supra*, at 734. P. 686.

(b) Here, the appellees claimed that the specific and allegedly illegal action of the ICC would directly harm them in their use of the natural resources of the Washington area. Pp. 686–687.

(c) Standing is not to be denied because many people suffer the same injury. Pp. 687–688.

(d) It cannot be said on these pleadings that appellees could not prove their allegations, which, if proved, would place them squarely among those persons injured in fact by the ICC's action and entitled to review under *Sierra Club, supra.* Pp. 688–690.

2. The District Court lacked jurisdiction to issue the injunction. Pp. 690–698.

(a) *Arrow Transportation, supra,* held that Congress in § 15 (7) had vested exclusive jurisdiction in the ICC to suspend rates pending its final decision on their lawfulness and had deliberately extinguished judicial power to grant such relief; and the factual distinctions between the instant case and *Arrow Transportation* are inconsequential. Pp. 690–692.

(b) The alleged noncompliance by the ICC with NEPA did not give the District Court authority to grant the injunction, as NEPA was not intended to repeal by implication any other statute, and the policies identified in *Arrow Transportation* as the basis for § 15 (7) would be substantially undermined if the courts were found to have suspension powers simply because of noncompliance with NEPA. Pp. 692–698.

346 F. Supp. 189, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BRENNAN and BLACKMUN, JJ., joined; in Parts I and II of which DOUGLAS and MARSHALL, JJ., joined; and in Parts I and III of which BURGER, C. J., and WHITE and REHNQUIST, JJ., joined. BLACKMUN, J., filed a concurring opinion, in which BRENNAN, J., joined, *post,* p. 699. DOUGLAS, J., filed an opinion dissenting in part, *post,* p. 699. WHITE, J., filed an opinion dissenting in part, in which BURGER, C. J., and REHNQUIST, J., joined, *post,* p. 722. MARSHALL, J., filed an opinion concurring in part and dissenting in part, *post,* p. 724. POWELL, J., took no part in the consideration or decision of the cases.

Solicitor General Griswold argued the cause for the United States et al. in No. 72–535. With him on the briefs were *Assistant Attorney General Frizzell, Edward R. Korman, Fritz R. Kahn, Betty Jo Christian,* and *James F. Tao. Hugh B. Cox* argued the cause for appellants in No. 72–562. With him on the briefs were *Charles A. Horsky, Michael Boudin,* and *Edward A. Kaier.*

Peter H. Meyers argued the cause *pro hac vice* for Students Challenging Regulatory Agency Procedures, appellee in both cases. With him on the brief was *John F. Banzhaf III*. *John F. Dienelt* argued the cause *pro hac vice* for Environmental Defense Fund et al., appellees in both cases. With him on the brief was *Dennis M. Flannery*.†

MR. JUSTICE STEWART delivered the opinion of the Court.

Under the Interstate Commerce Act, the initiative for rate increases remains with the railroads. But in the absence of special permission from the Interstate Commerce Commission, a railroad seeking an increase must provide at least 30 days' notice to the Commission and the public before putting the new rate into effect. 49 U. S. C. § 6 (3).[1] During that 30-day period, the Com-

†*Jerome J. McGrath* filed a brief for Independent Natural Gas Association of America as *amicus curiae* urging reversal.

Edward L. Merrigan filed a brief for National Association of Secondary Material Industries, Inc., as *amicus curiae* urging affirmance.

[1] Title 49 U. S. C. § 6 (3) provides: "No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further*, That the Commission is authorized to

mission may suspend the operation of the proposed rate for a maximum of seven months pending an investigation and decision on the lawfulness of the new rates. 49 U. S. C. § 15 (7).[2] At the end of the seven-month

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make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges, or classifications not changed if, in its judgment, not inconsistent with the public interest."

[2] Title 49 U. S. C. § 15 (7) provides in pertinent part: "Whenever there shall be filed with the Commission any schedule stating a new . . . rate, fare, or charge, . . . the Commission shall have . . . authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, [or] charge . . . ; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, [or] charge . . . , but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, [or] charge . . . goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, [or] charge . . . shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or

period, the carrier may put the suspended rate into effect unless the Commission has earlier completed its investigation and found the rate unlawful.[3]

Proceeding under this regulatory scheme, on December 13, 1971, substantially all of the railroads in the United States requested Commission authorization to file on 5 days' notice a 2.5% surcharge on nearly all freight rates. The railroads sought a January 1, 1972, effective date for the new rates. The surcharge was proposed as an interim emergency measure designed to produce some $246 million annually in increased revenues pending adoption of selective rate increases on a permanent basis.

As justification for the proposed surcharge, the railroads alleged increasing costs and severely inadequate revenues. In its last general revenue increase case, less than two years earlier, the Commission had found:

> "[T]he financial condition of the railroad industry as a whole, and the financial status of many individual carriers by rail, must be found to be at a dangerously low level. The precipitous decline in working capital and serious loss of liquidity has reduced many carriers to a truly marginal operation. This has been most clearly demonstrated by the recent bankruptcy application of the Penn Central. We think it undeniable that a number of

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charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, [or] charge . . . after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, [or] charge . . . is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

[3] Other statutory provisions giving suspension powers to the Commission include 49 U. S. C. §§ 316 (g), 318 (c) (Motor Carrier Act); 49 U. S. C. §§ 907 (g), (i) (Water Carrier Act); 49 U. S. C. § 1006 (e) (Freight Forwarders Act).

other roads are approaching a similar financial crisis." *Ex parte Nos. 265/267, Increased Freight Rates, 1970 and 1971,* 339 I. C. C. 125, 173.

The railroads alleged that, since the close of that proceeding, their costs had increased by over $1 billion on an annual basis, including $305 million in increased wages, while economic indicators such as decreased working capital and increased debt obligations pointed toward an ever-worsening financial condition.[4]

In an order dated December 21, 1971, the Commission acknowledged the need, particularly of some carriers, for increased revenues, but it concluded that five days' notice and a January 1, 1972, effective date "would preclude the public from effective participation." *Ex parte No. 281, Increased Freight Rates and Charges, 1972,* 340 I. C. C. 358, 361. The Commission authorized the railroads to refile the 2.5% surcharge with not less than 30 days' notice, and an effective date no earlier than February 5, 1972.

On January 5, 1972, the railroads refiled the surcharge, to become effective on February 5, 1972. Shippers, competing carriers, and other interested persons requested the Commission to suspend the tariff for the statutory seven-month period. Various environmental groups, including Students Challenging Regulatory Agency Procedures (SCRAP) and the Environmental Defense Fund (EDF), two of the appellees here, protested that failure to suspend the surcharge would cause their members "economic,

[4] Figures reported to the Commission indicated that the net working capital of the Class I railroads for the 12 months ending September 30, 1971, was only $75.4 million, approximately $33.7 million less than the year-end 1970 figure. Long-term debt maturing within one year from September 30, 1971, was $43.6 million higher than on December 31, 1970. Equipment obligations at the end of 1970 were $4,448 million, or almost twice the total in 1960.

recreational and aesthetic harm." Specifically, they claimed that the rate structure would discourage the use of "recyclable" materials, and promote the use of new raw materials that compete with scrap, thereby adversely affecting the environment by encouraging unwarranted mining, lumbering, and other extractive activities. The members of these environmental groups were allegedly forced to pay more for finished products, and their use of forests and streams was allegedly impaired because of unnecessary destruction of timber and extraction of raw materials, and the accumulation of otherwise recyclable solid and liquid waste materials. The railroads replied that since this was a general rate increase, recyclable materials would not be made any less competitive relative to other commodities, and that in the past general rate increases had not discouraged the movement of scrap materials.

The Commission issued an order on February 1, 1972, shortly before the surcharge would have automatically become effective. It recognized that "the railroads have a critical need for additional revenue from their interstate freight rates and charges to offset, in part, recently incurred increased operating costs," and announced its decision not to suspend the 2.5% surcharge for the seven-month statutory period.[5] In anticipation of the proposed permanent selective increases to be filed by the railroads and to avoid further complication of the tariff rates, the Commission specified that its refusal to suspend was conditioned upon the carriers' setting an expiration date for the surcharge of no later than June 5, 1972.[6] The Commission ordered the investigation into

[5] The order of the ICC is unreported.

[6] The Commission also imposed as a condition on its refusal to suspend the exclusion of increased rates "on freight in trailer bodies, semi-trailers, vehicles or containers on flat cars, on export and

the railroads' rates which had been instituted by its December 21 order to be held in abeyance until the carriers requested permission to file the indicated permanent rate increases on a selective basis. With respect to the appellees' environmental arguments, the Commission found that "the involved general increase will have no significant adverse effect on the movement of traffic by railway or on the quality of the human environment within the meaning of the [National] Environmental Policy Act of 1969."

The proposed permanent selective increases, averaging 4.1%, were subsequently filed with the Commission, and various parties again requested that these proposed rates also be suspended. By order served March 6, 1972, the Commission did not grant the railroads' request to have the selective increases go into effect on April 1, 1972, as they had sought but it allowed the carriers to republish their rates to become effective on May 1, 1972, upon not less than 45 days' notice to the public. The carriers did republish the rates, and on April 24, 1972, the Commission entered an order suspending the proposed selective increase for the full seven-month period allowed by statute, or to and including November 30, 1972.[7] The investigation into the increased rates was continued. Since the selective increases were to supplant the temporary surcharge, and since they had been suspended, the Commission modified its February 1 order and authorized the railroads to eliminate the June 5 expiration date for

import traffic." Since such increases had been proposed only by the western and southern carriers and not by the eastern carriers, such increases would, in the Commission's view, have disrupted existing port relationships.

Finally, the Commission conditioned its action on the provision that the proposed surcharge would not apply to shipments originating prior to February 5, 1972, and moving under transit arrangements.

[7] The March 6 and April 24 orders of the ICC are unreported.

the surcharge and to continue collecting the surcharge until November 30, 1972.

I

On May 12, 1972, SCRAP filed the present suit against the United States and the Commission in the District Court for the District of Columbia seeking, along with other relief, a preliminary injunction to restrain enforcement of the Commission's February 1 and April 24 orders allowing the railroads to collect the 2.5% surcharge.

SCRAP stated in its amended complaint that it was "an unincorporated association formed by five law students . . . in September, 1971. Its primary purpose is to enhance the quality of the human environment for its members, and for all citizens . . . ." To establish standing to bring this suit, SCRAP repeated many of the allegations it had made before the Commission in *Ex parte 281*. It claimed that each of its members "suffered economic, recreational and aesthetic harm directly as a result of the adverse environmental impact of the railroad freight structure, as modified by the Commission's actions to date in *Ex Parte 281*." Specifically, SCRAP alleged that each of its members was caused to pay more for finished products, that each of its members "[u]ses the forests, rivers, streams, mountains, and other natural resources surrounding the Washington Metropolitan area and at his legal residence, for camping, hiking, fishing, sightseeing, and other recreational [and] aesthetic purposes," and that these uses have been adversely affected by the increased freight rates, that each of its members breathes the air within the Washington metropolitan area and the area of his legal residence and that this air has suffered increased pollution caused by the modified rate structure, and that each member has been forced to pay increased taxes because of the sums which must be expended to dispose of otherwise reusable waste materials.

The main thrust of SCRAP's complaint was that the Commission's decisions of February 1 and April 24, insofar as they declined to suspend the 2.5% surcharge, were unlawful because the Commission had failed to include a detailed environmental impact statement as required by § 102 (2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U. S. C. § 4332 (2)(C). NEPA requires such a statement in "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment . . . ." *Ibid.*[8] SCRAP contended that because

[8] Section 102, 42 U. S. C. § 4332, provides in pertinent part:

"The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

. . . . . .

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

"(i) the environmental impact of the proposed action,

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

"(iii) alternatives to the proposed action,

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

"Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President,

of its alleged adverse impact upon recycling, the Commission's action with respect to the surcharge constituted a major federal action significantly affecting the environment.

Three additional environmental groups, also appellees here, were allowed to intervene as plaintiffs, and a group of railroads, appellants here, intervened as defendants to support the 2.5% surcharge.[9] After a single district

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the Council on Environmental Quality and to the public . . . and shall accompany the proposal through the existing agency review processes."

[9] The Environmental Defense Fund, National Parks and Conservation Association, and Izaak Walton League of America intervened as plaintiffs. The allegations as to standing made by each of these groups were similar to those made by SCRAP. EDF, for example, alleged as follows:

"EDF has a nationwide membership of over 32,000 persons composed of scientists, educators, lawyers and other citizens dedicated to the protection of our environment and the wise use of our natural resources. Each of EDF's members has a personal interest in the maintenance of a safe, healthful, productive environment as free from waste substances as is possible. EDF's members have contributed financially to EDF in part so that they may obtain adequate representation of their legally protected environmental interests, which representation they could not otherwise individually afford. Each of EDF's members has under § 101 (c) of NEPA, 'a responsibility to contribute to the preservation and enhancement of the environment,' which responsibility they fulfill in part by becoming a member of and contributing to EDF.

"The increased freight rates and charges in *Ex Parte 281* and the continuance of the underlying rate structure, which discriminate against movement of secondary (recyclable) materials, will cause EDF members individualized injury and adversely affect them in one or more of their activities and pastimes. Specifically, each EDF member: (i) has been or will be caused to pay more for products in the market place, made more expensive by both the non-use of recycled materials in their manufacture, and the need to use comparatively more energy in processing primary raw materials as opposed to secondary (recyclable) materials; (ii) uses the

judge had denied the defendants' motion to dismiss and SCRAP's motion for a temporary restraining order, a statutory three-judge district court was convened pursuant to 28 U. S. C. §§ 2284, 2325, to decide the motion for a preliminary injunction and the cross-motion to dismiss the complaint.

On July 10, 1972, the District Court filed an opinion, 346 F. Supp. 189, and entered an injunction prohibiting the Commission "from permitting," and the railroads "from collecting" the 2.5% surcharge "insofar as that surcharge relates to goods being transported for purposes of recycling, pending further order of this court." [10]

The court first rejected the contention that the appellees were without standing to sue because they allegedly had no more than "a general interest in seeing that the law is enforced," *id.*, at 195, and distinguished our recent decision in *Sierra Club* v. *Morton*, 405 U. S. 727, on the

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nation's forests, rivers, streams, mountains, and other natural resources for camping, hiking, fishing, sightseeing, and other recreational and aesthetic purposes. These uses have been and will continue to be adversely affected to the extent that the freight rate structure, as modified thus far in *Ex Parte 281*, encourages destruction of virgin timber, the unnecessary extraction of nonrenewable resources, and the discharge and accumulation of otherwise recyclable materials."

[10] The court dismissed as moot that part of the complaint relating to the Commission's February 1 order because that order had expired by its own terms on June 5. Since the environmental groups have not appealed from the judgment below, we have before us for review only the District Court's action with regard to the Commission's April 24 order that allowed the surcharge to continue until November 30, 1972.

The court also concluded that since the Commission had taken no final action with respect to the 4.1% selective increase, the lawfulness of that tariff was not ripe for review. The court did, however, retain jurisdiction over the case to review the final order of the Commission.

basis that, unlike the petitioner in *Sierra Club*, the environmental groups here had alleged that their members used the forests, streams, mountains and other resources in the Washington area and that this use was disturbed by the environmental impact caused by nonuse of recyclable goods.

Second, the court found that its power to grant an injunction was not barred by our decision in *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658, 667, where we held that in enacting 49 U. S. C. § 15 (7), Congress had intentionally vested "in the Commission the sole and exclusive power to suspend" and withdrew "from the judiciary any pre-existing power to grant injunctive relief." The court reasoned that NEPA "implicitly confers authority on the federal courts to enjoin *any* federal action taken in violation of NEPA's procedural requirements" "so long as the review is confined to a determination as to whether the procedural requisites of NEPA have been followed." 346 F. Supp., at 197 and n. 11.

Finally, turning to the merits, the court concluded that the Commission's April 24 decision not to suspend the surcharge for the statutory seven-month period was a " 'major Federal action significantly affecting the quality of the human environment.' " *Id.*, at 199. On the premise that an environmental impact statement is required "whenever the action *arguably* will have an adverse environmental impact," *id.*, at 201, the court held that "the danger of an adverse impact is sufficiently real to require a statement in this case." *Ibid.*

The District Court declined to stay its injunctive order pending appeal to this Court, and on July 19, 1972, THE CHIEF JUSTICE, as Circuit Justice for the District of Columbia Circuit, denied applications to stay the preliminary injunction. 409 U. S. 1207. On December 18, 1972, we noted probable jurisdiction of the appeals filed by the

United States, the Commission, and the railroads. 409 U. S. 1073.[11]

II

The appellants challenge the appellees' standing to sue, arguing that the allegations in the pleadings as to stand-

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[11] While subsequent events do not bear directly on the validity of the District Court's action in granting the preliminary injunction, they do highlight the problems that hover in the background of this litigation.

On October 4, 1972, the Commission served its report and order in *Ex parte 281* approving, with some exceptions, the general increases filed by the railroads. *Increased Freight Rates and Charges, 1972*, 341 I. C. C. 290. In that report, although the Commission gave extensive consideration to environmental aspects of the rate increases, it declined to include a formal environmental impact statement because it concluded that its actions "will neither actually nor potentially significantly affect the quality of the human environment . . . ." *Id.*, at 314.

The selective increases were to become effective on October 23, 1972, but the Commission delayed until November 12 the effective date for rate increases on recyclable commodities in order to allow the submission of comments by interested parties. Upon the submission of critical comments, the Commission, in an unreported order served on November 8, reopened the rate proceeding in *Ex parte 281* for further evaluation of the rates on recyclable commodities, and ordered the proposed selective tariff increases on those commodities suspended for the full seven-month period authorized by statute—until June 10, 1973. Accordingly, with respect to recyclable commodities on which the proposed selective increase had been suspended, the Commission extended the expiration date of the 2.5% surcharge until June 10, 1973, the expiration date for the suspension of the selective increases. But the Commission acknowledged that the power to collect the surcharge on these recyclable commodities was barred by the preliminary injunction issued by the District Court in the present case and which is the subject of the present appeals. In short, the temporary 2.5% surcharge would have been in effect throughout this period on recyclable commodities but for the District Court's resilient preliminary injunction. Whether the Commission deliberately continued the surcharge beyond the time it would have been supplanted by the selective increases in order to

ing were vague, unsubstantiated, and insufficient under our recent decision in *Sierra Club* v. *Morton, supra*. The appellees respond that unlike the petitioner in *Sierra*

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give the surcharge and the District Court's injunction continuing effect and thus avoid mooting this litigation, and whether the Commission acted beyond its powers under 49 U. S. C. § 15 (7) by suspending the selective increases for a second seven-month period and by treating the District Court's injunction as having continuing effect, are questions not raised here. No party now maintains that these cases are moot. Cf. *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515.

Both sets of appellees filed motions in the District Court: SCRAP sought a preliminary injunction against the Commission's October 4 order, and EDF and the other intervening plaintiffs sought leave to file an amended and supplemental complaint and requested other relief. On January 9, 1973, the court deferred consideration of the EDF motions and denied SCRAP's request for a preliminary injunction. The court found that as a result of the Commission's November 8 order, neither the selective rate increases nor the temporary surcharge could be assessed on recyclable commodities. Consequently, the court found, no injunctive relief was justified as to those materials. While the permanent rate increase approved by the Commission in *Ex parte 281* was then being collected on shipments of all other commodities, and although the Commission had concededly failed to file an impact statement, the court concluded that "the danger of an adverse impact appears to be sufficiently speculative . . . that it would be unsound to grant preliminary relief." The court continued: "The record indicates that many railroads are in dire financial straits—some on the verge of bankruptcy—and badly need the revenues now being obtained under the Commission's rate increase. The increase amounts to some $340 million per year, and were this revenue flow halted it could not easily be recouped should it later appear that no NEPA statement was necessary." The merits of neither the Commission's October 4 order nor the District Court's January 9 decision are before us, and we therefore express no opinion on them.

On May 7, 1973, the Commission served its final environmental impact statement relating to the selective rate increases on recyclable commodities. It concluded that the proposed increases would have no significant adverse effect on the environment. Contending that the impact statement was inadequate, EDF and SCRAP sought to

Club, their pleadings sufficiently alleged that they were "adversely affected" or "aggrieved" within the meaning of § 10 of the Administrative Procedure Act (APA), 5 U. S. C. § 702,[12] and they point specifically to the allegations that their members used the forests, streams, mountains, and other resources in the Washington metropolitan area for camping, hiking, fishing, and sightseeing, and that this use was disturbed by the adverse environmental impact caused by the nonuse of recyclable goods brought about by a rate increase on those commodities. The District Court found these allegations sufficient to withstand a motion to dismiss. We agree.

The petitioner in *Sierra Club,* "a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage from man's depredations," 405 U. S., at 739, sought a declaratory judgment and an injunction to restrain federal officials from approving the creation of an extensive ski-resort development in the scenic Mineral King Valley of the Sequoia National Forest. The Sierra Club claimed standing to maintain its "public interest" lawsuit because it had " 'a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country . . . .' " *Id.,* at 730. We held those allegations insufficient.

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enjoin collection of the selective rate increases. On June 7, 1973, the District Court temporarily enjoined the railroads from collecting the selective increases on recyclable commodities. On June 8, 1973, THE CHIEF JUSTICE, as Circuit Justice for the District of Columbia Circuit, stayed the District Court's injunction pending further order of this Court.

[12] Like the petitioner in *Sierra Club,* the appellees here base their standing to sue upon the APA, 5 U. S. C. § 702, which provides:

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Relying upon our prior decisions in *Data Processing Service* v. *Camp*, 397 U. S. 150, and *Barlow* v. *Collins*, 397 U. S. 159, we held that § 10 of the APA conferred standing to obtain judicial review of agency action only upon those who could show "that the challenged action had caused them 'injury in fact,' and where the alleged injury was to an interest 'arguably within the zone of interests to be protected or regulated' by the statutes that the agencies were claimed to have violated." 405 U. S., at 733.[13]

In interpreting "injury in fact" we made it clear that standing was not confined to those who could show "economic harm," although both *Data Processing* and *Barlow* had involved that kind of injury. Nor, we said, could the fact that many persons shared the same injury be sufficient reason to disqualify from seeking review of an agency's action any person who had in fact suffered injury. Rather, we explained: "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." *Id.*, at 734. Consequently, neither the fact that the appellees here claimed only a harm to their use and enjoyment of the natural resources of the Washington area, nor the fact that all those who use those

[13] As in *Sierra Club*, it is unnecessary to reach any question concerning the scope of the "zone of interests" test or its application to this case. It is undisputed that the "environmental interest" that the appellees seek to protect is within the interests to be protected by NEPA, and it is unnecessary to consider the various allegations of economic harm on which the appellees also relied in their pleadings and which the Government contends are outside the intended purposes of NEPA.

resources suffered the same harm, deprives them of standing.

In *Sierra Club,* though, we went on to stress the importance of demonstrating that the party seeking review be himself among the injured, for it is this requirement that gives a litigant a direct stake in the controversy and prevents the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders. No such specific injury was alleged in *Sierra Club.* In that case the asserted harm "will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort," *id.,* at 735, yet "[t]he Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the . . . development." *Ibid.* Here, by contrast, the appellees claimed that the specific and allegedly illegal action of the Commission would directly harm them in their use of the natural resources of the Washington Metropolitan Area.

Unlike the specific and geographically limited federal action of which the petitioner complained in *Sierra Club,* the challenged agency action in this case is applicable to substantially all of the Nation's railroads, and thus allegedly has an adverse environmental impact on all the natural resources of the country. Rather than a limited group of persons who used a picturesque valley in California, all persons who utilize the scenic resources of the country, and indeed all who breathe its air, could claim harm similar to that alleged by the environmental groups here. But we have already made it clear that standing is not to be denied simply because many people suffer the same injury. Indeed some of the cases on which we relied in *Sierra Club* demonstrated the patent fact that persons

across the Nation could be adversely affected by major governmental actions. See, *e. g., Environmental Defense Fund* v. *Hardin,* 428 F. 2d 1093, 1097 (interests of consumers affected by decision of Secretary of Agriculture refusing to suspend registration of certain pesticides containing DDT); *Reade* v. *Ewing,* 205 F. 2d 630, 631–632 (interests of consumers of oleomargarine in fair labeling of product regulated by Federal Security Administration). To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.

But the injury alleged here is also very different from that at issue in *Sierra Club* because here the alleged injury to the environment is far less direct and perceptible. The petitioner there complained about the construction of a specific project that would directly affect the Mineral King Valley. Here, the Court was asked to follow a far more attenuated line of causation to the eventual injury of which the appellees complained—a general rate increase would allegedly cause increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area. The railroads protest that the appellees could never prove that a general increase in rates would have this effect, and they contend that these allegations were a ploy to avoid the need to show some injury in fact.

Of course, pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action,

not that he can imagine circumstances in which he could be affected by the agency's action. And it is equally clear that the allegations must be true and capable of proof at trial. But we deal here simply with the pleadings in which the appellees alleged a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected.[14] If, as the railroads now assert, these allegations were in fact untrue, then the appellants should have moved for summary judgment on the standing issue and demonstrated to the District Court that the allegations were sham and raised no genuine issue of fact.[15] We cannot say on these pleadings that the ap-

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[14] The Government urges us to limit standing to those who have been "significantly" affected by agency action. But, even if we could begin to define what such a test would mean, we think it fundamentally misconceived. "Injury in fact" reflects the statutory requirement that a person be "adversely affected" or "aggrieved," and it serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, see *Baker* v. *Carr*, 369 U. S. 186; a $5 fine and costs, see *McGowan* v. *Maryland*, 366 U. S. 420; and a $1.50 poll tax, *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663. While these cases were not dealing specifically with § 10 of the APA, we see no reason to adopt a more restrictive interpretation of "adversely affected" or "aggrieved." As Professor Davis has put it: "The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 613. See also K. Davis, Administrative Law Treatise §§ 22.09–5, 22.09–6 (Supp. 1970).

[15] The railroads object to the fact that the allegations were not more precise—that no specific "forest" was named, that there was no assertion of the existence of any lumbering camp or other extractive facility in the area. They claim that they had no way to answer such allegations which were wholly barren of specifics. But, if that

pellees could not prove their allegations which, if proved, would place them squarely among those persons injured in fact by the Commission's action, and entitled under the clear import of *Sierra Club* to seek review. The District Court was correct in denying the appellants' motion to dismiss the complaint for failure to allege sufficient standing to bring this lawsuit.

III

We need not reach the issue whether, under conventional standards of equity, the District Court was justified in issuing a preliminary injunction, because we have concluded that the court lacked jurisdiction to enter an injunction in any event.

The District Court enjoined the Commission from "permitting," and the railroads from "collecting," the 2.5% interim surcharge on recyclable commodities. Finding that NEPA implicitly conferred authority "on the federal courts to enjoin *any* federal action taken in violation of NEPA's procedural requirements," 346 F. Supp., at 197, it concluded that our decision in *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658, did not affect judicial power to issue an injunction in the circumstances of this case. We cannot agree.

In *Arrow*, the Commission had suspended a railroad's proposed rates for the statutory seven-month period, and the railroad had voluntarily deferred the proposed rate

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were really a problem, the railroads could have moved for a more definite statement, see Fed. Rule Civ. Proc. 12 (e), and certainly normal civil discovery devices were available to the railroads.

Similarly, the District Court cannot be faulted for failing to take evidence on the issue of standing. This case came before the court on motions to dismiss and for a preliminary injunction. If the railroads thought that it was necessary to take evidence, or if they believed summary judgment was appropriate, they could have moved for such relief.

for an additional five months. When the Commission had not reached a final decision within that period, the railroad announced its intent to adopt the new rates. In a suit brought to enjoin the railroad from effectuating that change, we held that the courts were without power to issue such an injunction. From the language and history of § 15 (7) of the Interstate Commerce Act, we concluded that Congress had vested exclusive power in the Commission to suspend rates pending its final decision on their lawfulness, and had deliberately extinguished judicial power to grant such relief. The factual distinctions between the present cases and *Arrow* are inconsequential.

It is true that the injunction in *Arrow* was sought after the statutory seven-month period had expired and thus represented an attempt to extend judicially the suspension period, while here the injunction was issued during the suspension period. But *Arrow* was grounded on the lack of power in the courts to grant any injunction before the Commission had finally determined the lawfulness of the rates, and that holding did not depend on the fact that the availability of the Commission's power of suspension had passed. Indeed, the federal court decisions cited and approved in *Arrow* involved instances where the courts had been asked to enjoin rates *during* the statutory seven-month period. See, *e. g., M. C. Kiser Co.* v. *Central of Georgia R. Co.*, 236 F. 573, aff'd, 239 F. 718; *Freeport Sulphur Co.* v. *United States*, 199 F. Supp. 913; *Bison S. S. Corp.* v. *United States*, 182 F. Supp. 63; *Luckenbach S. S. Co.* v. *United States*, 179 F. Supp. 605, 609–610, vacated in part as moot, 364 U. S. 280; *Carlsen* v. *United States*, 107 F. Supp. 398.

Similarly, there is no significance in the fact that, unlike *Arrow*, the injunction in this litigation ran against the Commission as well as the railroads. The only

way in which the Commission could comply with the court's order would be to exercise its power of suspension and suspend the surcharge. The injunction constitutes a direct interference with the Commission's discretionary decision whether or not to suspend the rates. It would turn *Arrow* into a sheer formality and effectively amend § 15 (7) if a federal court could accomplish by injunction against the Commission what it could not accomplish by injunction directly against the railroads. And, again, the federal court decisions on which *Arrow* relied were for the most part cases in which the courts had held that they were without power to compel the Commission to grant a rate suspension. See, *e. g.*, *Bison S. S. Corp.* v. *United States, supra; Luckenbach S. S. Co.* v. *United States, supra; Carlsen* v. *United States, supra;* cf. *Freeport Sulphur Co.* v. *United States, supra.*[16]

Thus, the only arguably significant distinction between the present litigation and *Arrow* is that here the Commission allegedly failed to comply with NEPA. However, we cannot agree with the District Court that NEPA has amended § 15 (7) *sub silentio* and created an implicit exception to *Arrow* so that judicial power to grant in-

[16] EDF suggests that the April 24 order of the Commission was in fact a final order finding the surcharge "just and reasonable," not simply a refusal to suspend the surcharge. But the Commission's reference to the "just and reasonable" nature of the surcharge was a preliminary assessment commonly made in suspension orders. See, *e. g.*, the suspension orders quoted in *Naph-Sol Refining Co.* v. *United States,* 269 F. Supp. 530, 531; *Oscar Mayer & Co.* v. *United States,* 268 F. Supp. 977, 978–979. It did not represent a final determination by the Commission that any particular rate was just and reasonable. Indeed the Commission made it clear in its February 1 order that the surcharge was not considered a prescribed rate within the meaning of *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.,* 284 U. S. 370, and was subject to complaint and investigation under the Act.

junctive relief in this case has been revived.[17] NEPA, one of the recent major federal efforts at reversing the deterioration of the country's environment, declares "that it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U. S. C. § 4331. To implement these lofty purposes, Congress imposed a number of responsibilities upon federal agencies, most notably the requirement of producing a detailed environmental impact statement for "major Federal actions significantly affecting the quality of the human environment." 42 U. S. C. § 4332 (2)(C).[18] But

[17] An alternative ground for avoiding the *Arrow* decision, which was suggested but not relied on by the District Court, was that the surcharge here was an "agency-made" rate, not a "carrier-made" rate. *Moss* v. *CAB*, 430 F. 2d 891, which was cited by the court is, however, plainly inapposite. There the CAB suspended the rates proposed by the carriers, but suggested in their place "a complete and innovative scheme for setting all passenger rates for the continental United States." *Id.*, at 899. It was clear that when the carriers filed the rates suggested by the Board they would not be suspended. "Even a cursory reading of the order makes it clear that the Board told the carriers what rates to file; it set forth a step-by-step formula requiring major changes in rate-making practices and in rates which it expected the carriers to adopt." *Id.*, at 899–900. Here, by contrast, the level and structure of the rates were proposed entirely by the carriers. While the Commission suggested an expiration date for the surcharge, this was simply to make the surcharge expire when the general selective increases went into effect. This expiration date and the other standard conditions attached to the Commission's refusal to suspend the surcharge did not, in any meaningful sense, transform the carrier-made rate into a Commission-made rate.

[18] See n. 8, *supra*.

nowhere, either in the legislative history or the statutory language, is there any indication that Congress intended to restore to the federal courts the power temporarily to suspend railroad rates, a power that had been clearly taken away by § 15 (7) of the Interstate Commerce Act.

The statutory language, in fact, indicates that NEPA was not intended to repeal by implication any other statute. Thus, 42 U. S. C. § 4335 specifies that "[t]he policies and goals set forth in [NEPA] are supplementary to those set forth in existing authorizations of Federal agencies," and 42 U. S. C. § 4334 instructs that the Act "shall [not] in any way affect the specific statutory obligations of any Federal agency . . . ." Rather than providing for any wholesale overruling of prior law, NEPA requires all federal agencies to review their "present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of [NEPA] and shall propose to the President . . . such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in [NEPA]." 42 U. S. C. § 4333. It would be anomalous if Congress had provided at one and the same time that federal agencies, which have the primary responsibility for the implementation of NEPA,[19] must comply with present law and ask for any necessary new legislation, but that the courts may simply ignore what

[19] See *Greene County Planning Board* v. *FPC*, 455 F. 2d 412, 420; *Calvert Cliffs' Coordinating Comm.* v. *Atomic Energy Comm'n*, 146 U. S. App. D. C. 33, 43, 449 F. 2d 1109, 1119; *City of New York* v. *United States*, 337 F. Supp. 150, 160; *Cohen* v. *Price Comm'n*, 337 F. Supp. 1236, 1241.

we described in *Arrow* as "a clear congressional purpose to oust judicial power . . . ." 372 U. S., at 671 n. 22.[20]

The District Court pointed to nothing either in the language or history of NEPA that suggests a restoration of previously eliminated judicial power. While it relied primarily on the decisions of the Court of Appeals for the District of Columbia Circuit in *Calvert Cliffs' Coordinating Comm.* v. *Atomic Energy Comm'n*, 146 U. S. App. D. C. 33, 449 F. 2d 1109, and *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 149 U. S. App. D. C. 380, 463 F. 2d 783, neither case supports an injunction under the circumstances of this case. *Calvert Cliffs'* held that a federal court had power to review rules promulgated by the Atomic Energy Commission, and there the court ordered further consideration of the rules on the ground that there had not been compliance with NEPA. In *Committee for Nuclear Responsibility* it was held that federal courts had jurisdiction to consider whether an executive decision to conduct a nuclear test had satisfied the procedural re-

[20] The argument that NEPA implicitly restored to the courts the injunctive power that § 15 (7) had divested is similar to a contention rejected in *Arrow* itself. There the petitioners claimed that congressional adoption of the National Transportation Policy, 54 Stat. 899, had implicitly altered § 15 (7). They claimed that the proposed new railroad rates would drive the barge lines out of existence, contrary to the congressional declaration of concern for the protection of water carriers threatened by rail competition. The Court concluded that "nothing in the National Transportation Policy, enacted many years after . . . § 15 (7), indicates that Congress intended to revive a judicial power which . . . was extinguished when the suspension power was vested in the Commission." *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658, 673. In addition, the Court noted that, as is also true with NEPA, the mandate was directed not to the courts but to the Commission. There is nothing about NEPA that makes it any more amenable for finding an implicit amendment of § 15 (7), than the National Transportation Policy was.

quirements of NEPA. The question here, however, is not whether there is general judicial power to determine if an agency has complied with NEPA, and to grant equitable relief if it has not, cf. *Arrow Transportation Co.* v. *Southern R. Co., supra,* at 671 n. 22; *Scripps-Howard Radio, Inc.* v. *FCC,* 316 U. S. 4, but rather whether in a specific context NEPA *sub silentio* revived judicial power that had been explicitly eliminated by Congress. *Calvert Cliffs'* and *Committee for Nuclear Responsibility* have nothing to say on this issue, for neither was concerned with a specific statute that restricts the power of the federal courts to grant injunctions.[21]

Our conclusion that the District Court lacked the power to grant the present injunction is confirmed by the fact that each of the policies that we identified in *Arrow* as the basis for § 15 (7) would be substantially undermined if the courts were found to have suspension powers simply because noncompliance with NEPA was alleged.

First, *Arrow* found that the Commission had been granted exclusive suspension powers in order to avoid the diverse results that had previously been reached by the courts. District courts had differed as to the existence and scope of any power to grant interim relief, with the consequence that the uniformity of rates had been jeopardized, and different shippers, carriers, and areas of the country had been subjected to disparate treatment. Similarly, since a suit to enjoin a national rate increase on NEPA grounds could be brought in any federal district court in the country, see 28 U. S. C. §§ 2284, 2321–2325, the result might easily be that the courts would

[21] Indeed *Calvert Cliffs'* indicated that the requirements of § 102 of NEPA, see n. 8, *supra,* did not have to be complied with, if such compliance was precluded by another statutory provision. 146 U. S. App. D. C., at 39, 449 F. 2d, at 1115. And *Committee for Nuclear Responsibility,* in another context, endorsed a principle, equally applicable here, that "repeal by implication is disfavored." 149 U. S. App. D. C. 380, 382, 463 F. 2d 783, 785.

"[reach] diverse results, . . . [engendering] confusion and [producing] competitive inequities." 372 U. S., at 663. In short, a rate increase allowed in New York might be disallowed in New Jersey.

Second, we stressed in *Arrow* that § 15 (7) represents a careful accommodation of the various interests involved. The suspension period was limited as to time to prevent excessive harm to the carriers, for the revenues lost during that period could not be recouped from the shippers. On the other hand, Congress was aware that if the Commission did not act within the suspension period, then the new rates would automatically go into effect and the shippers would have to pay increased rates that might eventually be found unlawful. To mitigate this loss, Congress authorized the Commission to require the carriers to keep detailed accounts and eventually to repay the increased rates if found unlawful. To allow judicial suspension for noncompliance with NEPA, would disturb this careful balance of interests. A railroad may depend for its very financial life on an increased rate, and the rate may be perfectly just and reasonable. Granting an injunction against that rate based on the Commission's alleged noncompliance with NEPA, although the Commission had determined not to suspend the rate, would deprive the railroad of vitally needed revenues and result in an unjustified windfall to shippers.

Finally, we found in *Arrow* that any survival of a judicial power to grant interim injunctive relief would represent an undesirable interference with the orderly exercise of the Commission's power of suspension. Similarly, to grant an injunction in the present context, even though not based upon a substantive consideration of the rates, would directly interfere with the Commission's decision as to *when* the rates were to go into effect, and would ignore our conclusion in *Arrow* that "Congress meant to foreclose a judicial power to interfere

with the *timing* of rate changes which would be out of harmony with the uniformity of rate *levels* fostered by the doctrine of primary jurisdiction." 372 U. S., at 668. As the Court of Appeals for the Second Circuit explained in *Port of New York Authority* v. *United States*, 451 F. 2d 783, 788, where, on the basis of alleged noncompliance with NEPA, an injunction was sought against a Commission order refusing to suspend rates:

> "The basis of the decision in *Arrow*—that to permit judicial interference with the Commission's suspension procedures would invite the very disruption in the orderly review of the lawfulness of proposed tariffs that Congress meant to preclude—applies with equal force to the issue now before us."

Accordingly, because the District Court granted a preliminary injunction suspending railroad rates when it lacked the power to do so,[22] its judgment must be re-

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[22] In view of our conclusion that there was no power to grant the preliminary injunction, it is unnecessary for us to reach the other questions posed by the parties. For example, the Government and the railroads urge that, because of the pressures of time, an environmental impact statement is not required at the suspension stage of a rate proceeding, and, in any event, a decision by the Commission whether or not to suspend rates is not subject to judicial review. See *Port of New York Authority* v. *United States*, 451 F. 2d 783; *Oscar Mayer & Co.* v. *United States*, 268 F. Supp. 977; *M. C. Kiser Co.* v. *Central of Georgia R. Co.*, 236 F. 573; *Freeport Sulphur Co.* v. *United States*, 199 F. Supp. 913; *Luckenbach S. S. Co.* v. *United States*, 179 F. Supp. 605; *Carlsen* v. *United States*, 107 F. Supp. 398. The appellees in turn contend that some compliance with NEPA is possible at the suspension stage, and that such compliance is required if the statute is to be enforced "to the fullest extent possible." See 42 U. S. C. § 4332. And they urge that there is, or should be, an exception to the general principle of nonreviewability of suspension decisions for those cases where the Commission has acted beyond its statutory authority, or in violation of a clear statutory command or a procedural requirement, a standard that the appellees view as broad enough to en-

versed and the cases remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of these cases.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN joins, concurring.

I join the Court's judgment and its opinion, but because of the presence of the first sentence of Part III of the opinion, and to avoid any misunderstanding as to my posture, I add a few words.

For the reasons stated in my dissenting opinion in *Sierra Club* v. *Morton,* 405 U. S. 727, 755 (1972), I would hold that the appellees here have standing to maintain this action based on their allegations of harm to the environment resulting from the Commission's order of April 24, 1972. And, in evaluating whether injunctive relief is warranted, I would not require that the appellees, in their individual capacities, prove that they in fact were injured. Rather, I would require only that appellees, as responsible and sincere representatives of environmental interests, show that the environment would be injured in fact and that such injury would be irreparable and substantial.

MR. JUSTICE DOUGLAS, dissenting in part.

I

These cases present important environmental problems. They concern ratemaking for the shipment of

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compass alleged noncompliance with NEPA. See *Naph-Sol Refining Co.* v. *United States,* 269 F. Supp. 530, 532; *Oscar Mayer & Co.* v. *United States, supra,* at 982 (Doyle, J., concurring); *Long Island R. Co.* v. *United States,* 193 F. Supp. 795. We express no view on any of these issues.

litter for recycling. Paper, glass, and metals are the main items in today's garbage.[1] As indicated by the Bureau of Mines in Appendix I to this opinion, America's method of disposing of garbage is either to use it for landfill or to put it first through incinerators and then to bury the residue. Sorting and recycling have several environmental impacts: (1) reduction in the use of incinerators lessens air pollution; (2) establishing or encouraging removal of litter from the landscape; (3) recycling saves both renewable and nonrenewable resources. As respects the last, the tons of paper that are recycled, rather than burned, can be translated into the number of standing trees that need not be cut for pulp the next year; the metals recycled protect our remaining nonrenewable supplies of ore, and so on.

Rates fixed so as to encourage vast shipments of litter are, therefore, perhaps the most immediate and dramatic illustration of a policy which will encourage protection

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[1] In a Bureau of Mines' survey, it was established that metals and glass account for approximately 75 percent of the weight of the residues in municipal incinerator waste. Economics of Recycling Metals and Minerals from Urban Refuse, Bureau of Mines Technical Progress Report No. 33, p. 2 (Apr. 1971). From these materials, if recycled, familiar products such as bottles, newspapers, iron ingots, paper pulp, fuel oil, and methane gas can be manufactured. In addition, new products are being developed, such as glassphalt for street paving, insulation, glass wool, and glass bricks, in various colors that meet specifications for "severe weather" facing brick. *Id.*, at 7.

This project was launched under the Resource Recovery Act of 1970, 84 Stat. 1227, 42 U. S. C. § 3251 *et seq.*, under which the Secretary of HEW was authorized to provide technical and financial assistance in planning and developing resource recovery and solid waste disposal programs.

For a detailed account of a Resource Recovery Mill see Ross, How to Succeed in Recycling, Environmental Quality Magazine, June 1973, p. 51.

of the environment against several erosive conditions.[2] I would, therefore, affirm the eminently responsible decision of the District Court. 346 F. Supp. 189.

The National Environmental Policy Act of 1969, 83 Stat. 852, 42 U. S. C. § 4321 *et seq.*, declares a congressional policy

> "which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality." 42 U. S. C. § 4321.

That broad policy is further expounded in § 4331 (b) to include, *inter alia*, the objective that "the Nation may . . . (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings . . . and (6) enhance the quality of renewable resources and . . . depletable resources."

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[2] The necessity of reasonable transportation rates is even more apparent when it is realized that the volume of residue which is processed at a major recycling plant is between 250 and 1,000 tons per day. (Economics of Recycling Metals and Minerals from Urban Refuse, *supra*, n. 1, at 1.) Massive bulk transportation is therefore essential to these plant operations.

The problem is even more critical in urban areas where there is a high concentration of solid waste being generated and transportation to outlying recycling plants is a major cost factor. In 1968 a national survey found that an average of 8.2 pounds of waste per capita was collected daily in urban areas; this figure has now risen to 9 pounds. If present trends continue, this figure could be as high as 12 pounds in another 10 years. In our urban areas as a whole, the solid waste generated is fast approaching a ton a year for each man, woman, and child. Kramer, Energy Conservation and Waste Recycling, Science and Public Affairs 13, 17 (Apr. 1973).

The Government urges that appellees do not have standing to challenge the administrative determination of railroad freight rate increases. SCRAP alleged in its amended complaint that its members suffered environmental and economic injury as a result of the alleged increase, because the increase diminished the total amount of waste recycling in the United States, and made those products, which were in fact manufactured from the waste materials after the rate increase, more expensive in the marketplace. In addition, SCRAP alleged that each of its members in fact used the "forests, rivers, streams, mountains, and other natural resources . . ." for recreational purposes, and these uses were adversely affected because the Commission's rate increases discourage the reuse of recyclable commodities, such as bottles and cans, and encourage the depletion of natural resources.

In *Sierra Club* v. *Morton,* 405 U. S. 727, 734, this Court stated that, "We do not question that [environmental] harm may amount to an 'injury in fact' sufficient to lay the basis for standing under . . . the APA [5 U. S. C. § 702]. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." The members of SCRAP have clearly alleged an "injury in fact" to the environment and to their own personal continued use of it.

"There is nothing unusual or novel in granting the consuming public standing to challenge administrative actions." *Office of Communication of United Church of Christ* v. *FCC,* 123 U. S. App. D. C. 328, 359 F. 2d 994. This Court has indicated that where "statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action." *Data Processing Service* v. *Camp,* 397 U. S. 150, 154.

Littering is a commonplace phenomenon that affects every person, almost everywhere. From reports and writings we know that littering defaces mountain trails, alpine meadows, and even our highest peaks. Those in the valleys are often almost inundated with litter. Where a river is polluted and a person is dependent on it for drinking water, I suppose there would not be the slightest doubt that he would have standing in court to present his claim. I also suppose there is not the slightest doubt that where smog settles on a city, any person who must breathe that air or feel the sulphuric acid forming in his eyes, would have standing in court to present his claim. I think it is equally obvious that any resident of an area whose paths are strewn with litter, whose parks, or picnic grounds are defaced by it has standing to tender his complaint to the court. *Sierra Club* v. *Morton, supra,* would seem to cover this case, for littering abetted by the failure to recycle would clearly seem to implicate residents to whom "the aesthetic and recreational vaues of the area" are important. *Id.,* at 735. For the reasons stated in my opinion in *Sierra Club* v. *Morton, supra,* I agree with the Court that appellees have standing, but like MR. JUSTICE BLACKMUN, I would not require appellees, in their individual capacity, to prove injury in fact. As MR. JUSTICE BLACKMUN states, it should be sufficient if appellees, "as responsible and sincere representatives of environmental interests, show that the environment would be injured in fact . . . ."

II

The Council on Environmental Quality (CEQ), created in the Executive Office of the President, 42 U. S. C. § 4342, estimated in 1969 that this Nation produced more than 4.3 billion tons of solid refuse, including about 30 million tons of paper, 30 million tons of industrial fly ash, 15 million tons of scrap metal, 4 million tons of

plastics, 100 million automobile tires, 30 billion bottles, 60 billion cans, and millions of discarded automobiles and appliances. First Annual Report of CEQ, Aug. 1970, pp. 107–113. It reported that while most of the secondary material could be reused as a replacement for virgin material, only a small fraction was recycled. *Ibid.* One of the reasons for the absence of recycling was the high cost both of collection of the material and the transportation costs. *Ibid.*

As noted, one of the purposes of the Act was to "enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources." 42 U. S. C. § 4331 (b)(6). On October 9, 1970, Chairman Russell Train of CEQ wrote the Interstate Commerce Commission as follows:

> "The Council on Environmental Quality is deeply concerned with all facets of environmental quality. Solid waste disposal is one important aspect of the total pollution problem, and recycling is a new and desirable alternative to solid waste disposal which the Council strongly supports. The degree to which this technique will be used depends almost entirely on economics. Transportation costs, to the degree they increase secondary or scrap materials costs compared to the raw materials with which they compete, act as a disincentive to recycling. The Council believes that several rail haul costs biases currently exist and would like to discuss these cases with you. . . . In general, across-the-board percentage increases only widen existing price biases against secondary materials. Also, these increases raise the costs of doing business which can hinder the salvage and reclamation industry.
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> "In light of the President's concern with environmental quality, the growing problems of solid waste

and the importance of recycling to alleviating them, I would like to express the Council's hope that the Interstate Commerce Commission's actions on the key issue of scrap material transportation rates will be consistent with the Nation's environmental quality goals." App. 68.

In December 1971 substantially all the railroads filed with the Commission a request to impose a 2.5% surcharge on virtually all freight. The procedural details which followed are not presently material. Suffice it to say that shippers of recyclable materials submitted verified statements in support of their view that rate increases would intensify the disincentives to shipment and use of recyclable materials. Thus the Institute for Scrap Iron and Steel submitted a study showing:

"(1) Present scrap markets are retarded because of transport rates which encourage the usage of iron ore. (2) Future scrap markets are being affected because new investment that would logically be directed to scrap-intensive steelmaking is diverted because of the existing freight rate structure to ore-intensive steelmaking. (3) Iron ore (a limited domestic natural resource) is being exploited when it can and should be conserved. (4) Some scrap iron that should be recycled is unable to move, thus the environment is despoiled by unnecessary accumulations of solid metallic waste." T. Barnes, Impact of Railroad Freight Rates on the Recycling of Ferrous Scrap (Jan. 14, 1972).

The Commission instituted a proceeding concerning the guidelines which environmental impact statements required under the Act should follow. 339 I. C. C. 508. A spokesman for the eastern railroads filed an impact statement which said that "any possible adverse environmental impact in the form of reduced movements of com-

modities by rail will come only if we fail to provide adequate and efficient service" and that the need of the railroads to that end was for increased revenues. Appellees filed a protest and a request for a suspension of the proposed surcharge alleging that the present railroad rate structure discourages the movement of "recyclable" goods and that the surcharge would further discourage recycling.

The Commission, allowing the surcharge for a limited period, found that it would "have no significant adverse effect in the movement of traffic by railway or on the quality of the human environment" within the meaning of the 1969 Act. See 340 I. C. C. 358; 341 I. C. C. 287. Chairman Train of CEQ protested to the Commission on October 30, 1972:

> "It is understandable that difficulties will be encountered in quantifying the environmental consequences of an incremental freight rate increase on recyclable materials. In our view, however, these consequences must be assessed in the light of the rate disparity between secondary and primary materials that gives rise to the problem in the first place. This disparity is a matter of an entirely different magnitude, calling for a thorough environmental assessment as a precondition to determining whether subsequent incremental increases require additional environmental impact statements. . . . Clearly at some point increases which might be individually 'insignificant' become cumulatively 'significant.' In addition, the claim that freight rates on recycled products must be increased to respond to 'emergency' revenue needs pending completion of the required, overall environmental evaluation, loses much of its force as months turn into years and the basic investigation remains uncompleted. Finally, even the 'emergency' argument itself, however legitimate, in

> no way forecloses the consideration of alternatives which would both meet revenue needs and at the same time avoid further potential environmental damage while the basic rate structure issue is being resolved. Alternatives of this sort were, in fact, suggested in the partial dissenting opinions of Commissioners Brown and Deason (who would have denied approval of increases for recyclable commodities), with no indication in the Commission's majority report that such measures would not have been sufficient to meet the revenue needs relied on to justify the rate increases. . . . In summary, the Council feels that the basic environmental issues related to the existing freight rate structure and changes thereto, must be evaluated in a logical, analytical and timely fashion in compliance with the requirements of the National Environmental Policy Act. The Commission's actions to date appear to be inconsistent with the objectives of NEPA, and the analyses undertaken to date by the Commission appear to offer an inadequate basis from which to draw conclusions concerning the impact of freight rates on recycling and enviromental quality. Our staff is available to discuss the NEPA procedural issues as well as to assist in structuring the analytical work required to assess adequately the environmental impact of freight rates." [3] App. 87–89.

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[3] In his report before the Senate, Senator Jackson, one of the three legislators most responsible for NEPA, stated: "To insure that the policies and goals defined in this act are infused into the ongoing programs and actions of the Federal Government, the act also establishes some important 'action-forcing' procedures. Section 102 authorizes and directs all Federal agencies, to the fullest extent possible, to administer their existing laws, regulations, and policies in conformance with the policies set forth in this act. It also directs all agencies to assure consideration of the environmental impact of their actions in decision-making. It requires agencies which propose actions to

The three-judge District Court held that the conclusion of the Commission that the rate increase would have "no significant adverse effect" on the environment within the meaning of EPA was "transparent" and "a ruse." 346 F. Supp., at 200–201. This leads to an analysis of § 102 of NEPA.[4]

That section is directed to "all agencies of the Federal Government," which of course includes the Interstate Commerce Commission. It directs the agency to interpret and administer "the policies, regulations, and public laws" which it administers "to the fullest extent possible" in accordance with the policies of EPA. It directs the agency[5] to include in "major Federal actions significantly affecting the quality of the human environment" a detailed statement "by the responsible official on—(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship

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consult with appropriate Federal and State agencies having jurisdiction or expertise in environmental matters and to include any comments made by those agencies which outline the environmental considerations involved with such proposals.

"Taken together, the provisions of section 102 directs [*sic*] any Federal agency which takes action that it must take into account environmental management and environmental quality considerations." 115 Cong. Rec. 40416 (1969).

[4] The totality of § 102 is so important to this litigation that I have set it forth in Appendix II to this dissent.

[5] Senator Jackson was reported as saying:

"We expected Section 102 of the act which requires environmental impact statements and analysis of alternatives for all major federal actions significantly affecting the quality of the human environment to force the agencies to move. . . . We did not anticipate that it would be private parties through the courts that would force the compliance. This is what has made it work." Cahn, Can Federal Law Help Citizens Save Nature's Fragile Beauty?, Christian Science Monitor 12 (Feb. 28, 1973).

between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, . . . and shall accompany the proposal through the existing agency review processes." 83 Stat. 853.

Rates affecting litter, like rates affecting other commodities, obviously are relevant to the ease and expedition with which it will be transported. To get the litter to appropriate recycling plants in the quantities needed to protect our fast depleting forests and our nonrenewable resources [6] and to relieve our landscape of the litter that plagues us may need special incentive rates.

The report, H. R. Conf. Rep. No. 91–765, makes clear that no agency of the Federal Government is exempt and that each should comply unless existing law applicable to the agency "expressly prohibits or makes full compli-

[6] Waldo E. Smith, of the American Geophysical Union, recently stated: "The total supply of most metals is sharply limited; even now we must dig deeper, go farther, and use lower grade ores. No optimism is justified here. The supply can be extended substantially by intelligent recycling, which should be an important by-product of our cleaning up to maintain a clean environment." Resources and Long-Forecasts, Science and Public Affairs 21, 22 (May 1973).

ance with one of the directives impossible." The report states:

> "The purpose of the new language is to make it clear that each agency of the Federal Government shall comply with the directives set out in such subparagraphs (A) through (H) unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible. If such is found to be the case, then compliance with the particular directive is not immediately required. However, as to other activities of that agency, compliance is required. Thus, it is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section 'to the fullest extent possible' under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance." *Id.*, at 9–10.

The District Court, acting responsibly in light of the broad and clear-cut policy of the Act concluded that it sets a " 'high standard' " for federal agencies, that there is no " 'escape hatch for footdragging agencies,' " that the Act does not make the preparation and use of these impact statements " 'discretionary,' " that Congress did not intend that this Act be " 'a paper tiger.' " 346 F. Supp., at 199.[7]

[7] When Congress desires exceptions to be made to the impact statement requirement under the NEPA, express exemption is provided. For example, Pub. Law 92-307, 86 Stat. 191, pro-

Arrow Transportation Co. v. *Southern R. Co.*, 372 U. S. 658, does not preclude review here. In *Arrow* there were rates which the Commission had the power to suspend but had not suspended. The power of suspension was entrusted to the Commission only; and we held that the courts should not intrude when the Commission has not acted. Here the Commission has acted; it has found that "the increases here proposed are just and reasonable, that the revenues derived therefrom will result in earnings

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vides that the Atomic Energy Commission can grant a temporary operating license for a nuclear power reactor without the completion of an environmental impact statement, if the application for the operating license was filed before September 9, 1971, and the Commission holds a hearing which leads to the findings, among others, that the operation of the facility during the period of the temporary operating license in accordance with its terms and conditions will provide adequate protection of the environment during that period and that the operation of the facility is essential toward insuring the power-generating capacity of a utility system. The Commission is empowered to impose such terms and conditions as it deems necessary, and its decision is subject to judicial review.

Some federal agencies are taking affirmative action to promote the purposes of § 105. Thus the Securities and Exchange Commission recently adopted amendments to its registration and reporting forms to require more meaningful disclosure of certain items pertaining to the effect on the issuer's business of compliance with federal, state, and local laws and regulations relating to the protection of the environment. The amendments will require as a part of the description of the issuer's business, appropriate disclosures with respect to the material effects which compliance with environmental laws and regulations may have upon the capital expenditures, earnings, and competitive position of the issuer and its subsidiaries. Other amendments describe the extent to which litigation disclosures should contain specific descriptions of environmental proceedings. Securities and Exchange Comm'n Release (Securities Act Rel. No. 5386, Apr. 20, 1973). See *Scientists' Institute* v. *AEC*, 156 U. S. App. D. C. 395, 481 F. 2d 1079, holding that an impact statement must be filed for the Atomic Energy Commission's liquid metal fast breeder reactor program.

and rates of return . . . not in excess of that required to enable" the carriers "to render adequate and efficient transportation at the lowest cost consistent with the furnishing of such service." *Ex parte 281*, Order of Feb. 1, 1972 (unreported). The Commission said it was not prescribing rates, though it attached conditions on approval of the rates without suspension. It made clear it would suspend the new rates if the conditions were not added. As stated by the three-judge court: "A suspension decision which effectively blackmails the carriers into submitting agency-authored rates is functionally indistinguishable from an agency order setting those rates." 346 F. Supp., at 197.

Moreover, as the three-judge court held and as Judge Friendly observed in *City of New York* v. *United States*, 337 F. Supp. 150, 164, "NEPA is a new and unusual statute imposing substantive duties which overlie those imposed on an agency by the statute or statutes for which it has jurisdictional responsibility."

The Court today greatly weakens NEPA in a crucially important segment of the federal environmental field. Movement of litter to recycling plants [8] is critically important, as Chairman Train makes abundantly clear. The alternative is to leave it underfoot or to cart it off as garbage to incinerators that pollute the air or to landfills that are getting more and more difficult to find.[9] We know that recycled paper, recycled copper, recycled

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[8] Senator Jackson recently was reported as saying about these impact statements:

"We also should be able to get generic environmental impact statements—updated every six months or so—for energy policy, transportation policy, and other major policy decisions." *Cahn, supra*, n. 5.

[9] Most of the Nation's waste is relocated into dumps with only approximately 10% to 15% finding its way into sanitary landfills. Kramer, *supra*, n. 2, at 17.

iron, and recycled glass are practical. The Federal Bureau of Mines in its pilot plant at Edmonston, Maryland, boasts that "urban ore," as it calls this debris, costs about $3 a ton and recycled is worth $11 a ton. We know that we deal here with nonrenewable resources. We are told that recycling paper saves thousands of acres of trees a year.[10]

Under the Act, the appraisal by the Council on Environmental Quality of which Russell Train is the chairman is a weighty one, for under § 204 of the Act it has the responsibility "to appraise the various programs and activities of the Federal Government" in light of the policy of the Act and "to develop and recommend . . . national policies to foster and promote the improvement of environmental quality." 83 Stat. 855; 42 U. S. C. §§ 4344 (3), (4). CEQ is, in other words, the expert ombudsman in the environmental area.

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[10] Congressman Dingell, another main sponsor of NEPA, recently was reported as saying:

"The success of the environmental impact statements is not so much that they were used as we intended they should, but that citizens have been able to use the process as a [way] to get into courts. . . . Some agencies are complying poorly. They decide what they are going to do and then write an environmental impact statement to support the decision. That is not what Congress had in mind. I am fearful that we are breeding a race of impact statement writers who put all the right words down but don't really get environmental concerns involved in the decision-making process. The impact statement itself is not important. The important thing is that proper judgments are made reflecting environmental considerations in the decision-making process. The impact statement should be a discipline for this and also a process by which the public can be informed and brought into the decision-making process." *Cahn, supra,* n. 5.

For a recent account of impact statements on transportation problems see Robert Cahn (former member of CEQ), Environmentalists Wary of Transport Trend, Christian Science Monitor 12 (Feb. 28, 1973).

The apparent tendency among federal agencies, Congressman Dingell says,[11] is to decide first what they want to do and then prepare an impact statement as an *apologia* for what they have done. That puts the cart before the horse. That is what the Commission did here. But that is to adopt "an excessively narrow construction" of its statutory power "to avoid compliance" with the new environmental standards—all as condemned in the Conference report, *supra*, at 10. That is to say, environmental considerations are, so far as possible, to shape all agency policies and decisions.

These cases are, indeed, Exhibit A of the current practice of federal agencies to undermine the policy announced by Congress in NEPA. Rail rates were long discriminatory in retarding the industrial development of the South. *New York* v. *United States*, 331 U. S. 284. The present rates are arguably discriminatory against the removal of the litter which is about to engulf us. The wisdom of Chairman Train, rather than the technical maneuvers of the Commission, should be our guide.

I would affirm the judgment of the District Court.

APPENDIX I TO OPINION OF DOUGLAS, J., DISSENTING IN PART

The Bureau of Mines had at Edmonston, Maryland, for several years an incinerator residue processing plant on the basis of which Lowell, Massachusetts, instituted its Resource Recovery Project.

The Edmonston project is now engaged in recycling of raw waste and the following is the Bureau's description of the nature and scope of that project.

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[11] See n. 10, *supra*.

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FACT SHEET

Edmonston (Md.) Solid Waste Recycling Project
Bureau of Mines

DEPARTMENT OF THE INTERIOR

An important part of the solid waste utilization research carried on by the Bureau of Mines is to develop methods and processes for recycling mineral materials present in urban refuse. Engineers from the Bureau's College Park (Md.) Metallurgy Research Center operate a pilot plant at Edmonston, Maryland, where they reclaim ferrous metals, nonferrous metals, glass, plastics, and paper from raw unburned refuse. The following facts are pertinent to the research underway at the Edmonston pilot plant.

xxx—100 pounds of typical municipal refuse contains: 36.6 pounds of paper and cardboard; 20.2 pounds of garbage; 8.4 pounds of metal; 8.5 pounds of glass; 17.4 pounds of leaves, grass, hedge clippings and tree prunings; 2.6 pounds of scrap wood; 1.1 pound of plastics; and 5.2 pounds of miscellaneous material including leather, rubber, textiles, bricks, stones, and dirt.

xxx—Urban refuse generated in the U. S. in 1972 totaled 300 million tons, or the equivalent of more than 8 pounds daily for every man, woman, and child.

xxx—Only 220 million tons of municipal refuse was regularly collected by public agencies and private firms. The remainder (80 million tons) was abandoned, dumped at the point of origin, or hauled to uncontrolled disposal sites.

xxx—The volume of municipal refuse accumulating in the U. S. in a single year would cover an area half the size of the State of Connecticut (2,500 sq. mi.) with a layer of refuse 1 foot deep. This refuse contains some 12 million tons of iron and steel, 13 million tons of glass, and over a million tons of aluminum, zinc, lead, tin, and copper.

xxx—Collecting and disposing of refuse costs cities an average of $23 per ton ($18, for collection and $5, for disposal). New York City, at a cost of $40 per ton, spends almost a million dollars each day to collect and dispose of solid waste. Total U. S. bill runs about $6 billion annually.

xxx—Most municipal refuse is disposed of by dumping, landfill, or incineration. About 30 million tons of municipal refuse is

burned annually in more than 300 municipal incinerators. These incinerators generate 7.5 million tons of residues, which are then buried. The process developed by the Bureau to reclaim the values from incinerator residues has attracted world-wide attention. A commercial size plant of this type will soon be under construction in Lowell, Massachusetts, with seventy-five percent of the $3.2 million required, being provided by the Environmental Protection Agency.

xxx—Successful reclamation of mineral values from incinerator residues at the Bureau's pilot plant prompted research to save also that part of municipal refuse that is now being lost during burning. This would reduce the need for building more municipal incinerators, saving their construction and operating costs, and would bring income from salvaged paper and plastics as well as metals and glass. It would also eliminate air pollution problems connected with incineration.

xxx—Equipment for mechanical separation of metals, glass, paper, and plastics from municipal refuse before incineration has been assembled at Edmonston. The process involves coarse shredding of the refuse, followed with air classification, magnetic separation, screening, optical sorting, electrostatic separation, and gravity concentration—all proven methods used in the minerals industries.

xxx—Other refuse recycling schemes have been proposed and some are already under development. The process developed by the Bureau is unique in the following major respects: (1) it is the only process that embodies a complete system, (2) it is the only process capable of capturing and concentrating putrescibles and glass, (3) it is the only process that produces a tin can product suitable for detinning, (4) it is the only process capable of accepting extremely massive pieces of metal, (5) it is the only process that can successfully separate plastics and paper, and (6) energy requirements for the Bureau's process are by far the least of all proposed processes.

xxx—A plant processing 1,000 tons of raw refuse per day could be expected to reclaim each day enough ferrous metal to make all the iron and steel parts for more than 55 4-door sedans.

xxx—About 36 billion bottles are discarded each year in the U. S. as solid waste. Each American discards a glass bottle on the average of about one every two days. The average returnable beer bottle used to make 31 round trips from the brewery, to the consumer, and back to the brewery. The average is now

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19 trips. In some cities, it is only 4. People are discriminating less between returnable and non-returnable bottles.

xxx—Glass reclaimed from raw refuse can be used in making new glass, or for such salable products as building bricks, mineral wool for insulation, and road surfacing (when ground and mixed with asphalt).

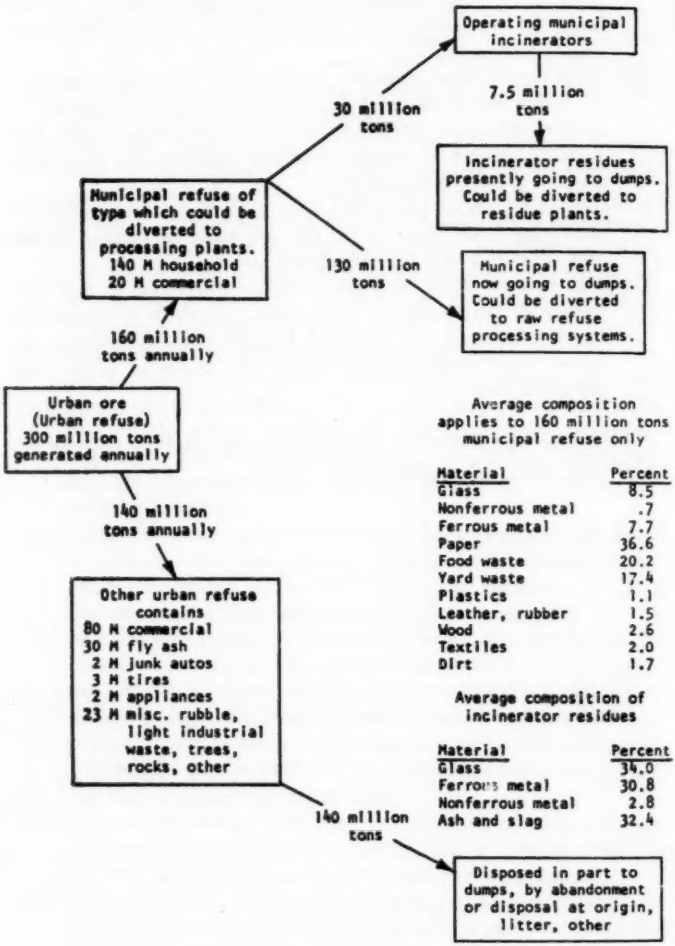
xxx—Aluminum present in refuse in the form of cans alone amounts to 10 percent of the total primary production. This metal together with other aluminum recovered from refuse would find a ready market at existing secondary smelters for conversion to high grade casting alloys.

xxx—The other heavy nonferrous metals could be used readily in producing brass ingot or the mixture could be further refined and separated into the constituent metals.

xxx—The rate at which we generate refuse is growing so fast that within 20 years, even if we are able to recycle 70 percent of our solid wastes our needs for landfill space will remain the same. And landfill space is, even now, becoming harder and harder to find.

[Refuse-disposal and refuse-recovery charts appear on pp. 718 and 719 respectively.]

URBAN REFUSE DISPOSAL IN THE UNITED STATES 1972


Operating municipal incinerators
7.5 million tons
30 million tons
Incinerator residues presently going to dumps. Could be diverted to residue plants.
Municipal refuse of type which could be diverted to processing plants. 140 M household 20 M commercial
130 million tons
Municipal refuse now going to dumps. Could be diverted to raw refuse processing systems.
160 million tons annually
Urban ore (Urban refuse) 300 million tons generated annually
140 million tons annually
Other urban refuse contains 80 M commercial 30 M fly ash 2 M junk autos 3 M tires 2 M appliances 23 M misc. rubble, light industrial waste, trees, rocks, other
140 million tons
Disposed in part to dumps, by abandonment or disposal at origin, litter, other

Average composition applies to 160 million tons municipal refuse only

Material	Percent
Glass	8.5
Nonferrous metal	.7
Ferrous metal	7.7
Paper	36.6
Food waste	20.2
Yard waste	17.4
Plastics	1.1
Leather, rubber	1.5
Wood	2.6
Textiles	2.0
Dirt	1.7

Average composition of incinerator residues

Material	Percent
Glass	34.0
Ferrous metal	30.8
Nonferrous metal	2.8
Ash and slag	32.4

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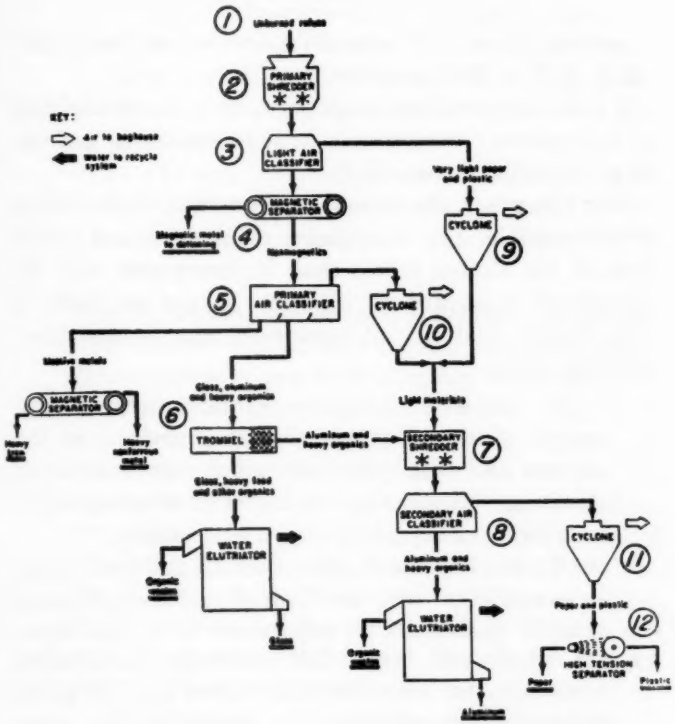
BUREAU OF MINES DRYSORT REFUSE RECOVERY SYSTEM



APPENDIX II TO OPINION OF DOUGLAS, J., DISSENTING IN PART

Section 102 of the National Environmental Policy Act, 42 U. S. C. § 4332 provides:

§ *4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts.*

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

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(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international

cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by subchapter II of this chapter.

Pub. L. 91–190, Title I, § 102, Jan. 1, 1970, 83 Stat. 853.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting in part.

I would reverse the judgment of the District Court and order the complaint dismissed because appellees lack standing to bring this suit. None of our cases, including inferences that may be drawn from dicta in *Sierra Club* v. *Morton*, 405 U. S. 727 (1972), where we denied standing to petitioner there, are sufficient to confer standing on plaintiffs in circumstances like these. The allegations here do not satisfy the threshold requirement of injury in fact for constituting a justiciable case or controversy. The injury alleged is that the failure of the Commission to suspend a 2.5% freight rate increase may discourage the transportation of recyclable materials, thus retarding the use of recycled materials, causing further consumption of our forests and natural resources (some of which might be taken from the Washington metropolitan area), and resulting in more refuse and undisposable materials to further pollute the environment.

The majority acknowledges that these allegations reflect an "attenuated line of causation," *ante*, at 688, but is willing to suspend its judgment in the dim hope that proof at trial will in some unexplained way flesh

them out and establish the necessary nexus between these appellees and the across-the-board rate increase they complain of. To me, the alleged injuries are so remote, speculative, and insubstantial in fact that they fail to confer standing. They become no more concrete, real, or substantial when it is added that materials will cost more at the marketplace and that somehow the freight rate increase will increase air pollution. Allegations such as these are no more substantial and direct and no more qualify these appellees to litigate than allegations of a taxpayer that governmental expenditures will increase his taxes and have an impact on his pocketbook, *Massachusetts* v. *Mellon,* 262 U. S. 447, 486–489 (1923), or allegations that governmental decisions are offensive to reason or morals. The general "right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted" does not confer standing to litigate in federal courts. *Fairchild* v. *Hughes,* 258 U. S. 126, 129 (1922). New York did not have standing to complain when it asserted merely the possible adverse effects of diversion of water from Lake Michigan upon hypothetical power developments in "the indefinite future." *New York* v. *Illinois,* 274 U. S. 488, 490 (1927). Assumed potential invasions are insufficient bases for a justiciable case or controversy. *Arizona* v. *California,* 283 U. S. 423, 462 (1931). As I see the allegations in this case, they are in reality little different from the general-interest allegations found insufficient and too remote in *Sierra Club.* If they are sufficient here, we are well on our way to permitting citizens at large to litigate any decisions of the Government which fall in an area of interest to them and with which they disagree.

Assuming, however, that a majority of the Court adheres to the conclusion that a constitutional case or controversy exists in these circumstances and that plain-

tiffs may sue, I would agree that the District Court erred in entering an injunction which Congress quite clearly had long since divested it of the power to enter. Accordingly, I join Part III of the Court's opinion. I add only that failure to maintain this country's railroads even in their present anemic condition will guarantee that recyclable materials will stay where they are—far beyond the reach of recycling plants that as a consequence may not be built at all.

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

I fully agree with and join in Part II of the Court's opinion wherein it sustains the District Court's determination that the appellees have standing to challenge the 2.5% interim surcharge on the ground that the Interstate Commerce Commission's order of April 24 permitting the surcharge to take effect was not issued in compliance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U. S. C. § 4321 *et seq.* The Court goes on, however, to hold in Part III of its opinion that the District Court lacked power to issue a preliminary injunction barring implementation of the surcharge due to the Commission's alleged failure to comply with NEPA in the suspension stage of the rate proceeding. The Court's decision in this respect is, to be sure, a very narrow one; the decision clearly concerns only the scope of remedies available to the District Court in the context of a case of this particular character,[1] that is, an ICC rate suspension case.

[1] Given that the Court holds only that the District Court lacked power to grant preliminary injunctive relief, it presumably remains open to appellees to challenge the Commission's alleged failure to comply with NEPA in the suspension stage of the proceedings concerning the interim surcharge in an action for declaratory relief. Nor does anything in the Court's opinion today deny to the dis-

The Court specifically refrains from deciding whether or not the Commission's alleged failure to comply with NEPA in the suspension stage is a proper subject for judicial review and, if so, what would constitute adequate compliance with NEPA at that juncture in the administrative process. See *ante*, at 698–699, n. 22. Nonetheless, I am unable to join the third portion of the Court's opinion, for I am convinced that there is no lack of judicial power to issue a preliminary injunction against the interim surcharge in the context of these cases. I therefore must respectfully dissent from Part III of the Court's opinion.

At the outset, it is essential for purposes of analysis to put the issue upon which the Court disposes of the cases in proper perspective. Since the Court addresses only the issue of the District Court's power to grant preliminary relief, we must, of course, assume for the sake of argument that the issues which the Court does not now reach—namely, whether the procedural requirements of NEPA [2] are applicable at the suspension stage and whether the issue of Commission compliance is a proper one for judicial review [3]—are to be decided in appellees' favor. In addition, we must accept for the present appellees' assertions that the interim surcharge, by rais-

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trict courts power to enjoin the Commission to comply with NEPA in the context of a particular rate proceeding so long as no injunction is issued barring implementation of the rates themselves, cf. *Atchison, T. & S. F. R. Co.* v. *Wichita Board of Trade*, *post*, p. 800.

[2] See in particular § 102 (2)(C) of the Act, 42 U. S. C. § 4332 (2)(C).

[3] Cf., *e. g.*, *Upper Pecos Assn.* v. *Stans*, 452 F. 2d 1233 (CA10 1971), vacated and remanded for consideration of mootness *sub nom. Upper Pecos Assn.* v. *Peterson*, 409 U. S. 1021 (1972); *Calvert Cliffs' Coordinating Comm.* v. *Atomic Energy Comm'n*, 146 U. S. App. D. C. 33, 449 F. 2d 1109 (1971); *City of New York* v. *United States*, 337 F. Supp. 150, 158–160 (EDNY 1972).

ing the cost of shipping recyclable materials, will further accentuate the allegedly unjustifiable disparity between the cost of shipping those materials and the cost of shipping primary goods, thereby irrationally encouraging the use of primary goods which will lead to a further degradation of our environment. In other words, in considering the question of judicial power, we must accept the correctness of the District Court's determination that there was a "strong likelihood" that the Commission had erred in its conclusion that the interim surcharge " 'will have no significant adverse effect on . . . the quality of the human environment within the meaning of the Environmental Policy Act of 1969,' " 346 F. Supp., at 200, 201, a conclusion that had effectively excused the Commission from compliance with the procedural requirements of NEPA in the context of the surcharge, see 42 U. S. C. § 4332 (2)(C).

Turning then to the issue of judicial power, it must first be recalled that we deal here with the grant of only a preliminary injunction; the District Court did not permanently enjoin enforcement of the interim surcharge upon determining that the Commission had, in all likelihood, failed to comply with NEPA in the suspension stage. Properly viewed, I think the injunction at issue in this case amounts to nothing more than a legitimate effort by the District Court, following the Commission's refusal to suspend the surcharge, to maintain the *status quo* pending final judicial determination of the legality of the Commission's action at the suspension stage in light of the requirements of NEPA. And, by now, the equitable power of the federal courts to grant interim injunctive relief pending determination of an appeal is well established. The nature of that power was explored at length by the Court in *Scripps-Howard Radio, Inc.* v. *FCC,* 316 U. S. 4 (1942), where it was held that a court of appeals had power, pending determination of an ap-

peal, to stay the Federal Communications Commission's grant of a construction permit although the Federal Communications Act made no provision for such a stay. Speaking for the Court, Mr. Justice Frankfurter explained:

> "No court can make time stand still. The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite anything a court can do. But within these limits it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong. It has always been held, therefore, that as a part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal." *Id.*, at 9–10.

See also *FTC* v. *Dean Foods Co.*, 384 U. S. 597, 604 (1966); *Whitney National Bank in Jefferson Parish* v. *Bank of New Orleans & Trust Co.*, 379 U. S. 411, 425 (1965).

This Court has consistently adhered to the view that it will find federal courts to have been deprived of their traditional power to stay orders under review only in the face of the clearest possible evidence of a congressional intent to do so. See *Scripps-Howard Radio, Inc.* v. *FCC*, *supra*, at 11, 15. No such clear intent is to be found in the Interstate Commerce Act, at least not with respect to a case such as this where the Commission has already acted on the relevant issue and the issue lies in an area outside the Commission's traditional expertise.[4] In *Arrow Transportation Co.* v. *Southern R.*

[4] Thus, I cannot accept the Court's assertion that the question here is "whether in a specific context NEPA *sub silentio* revived

Co., 372 U. S. 658, 664 (1963), this Court specifically acknowledged that "[i]t cannot be said that the legislative history of the grant of the suspension power to the Commission includes unambiguous evidence of a design to extinguish whatever judicial power may have existed prior to [the establishment of suspension powers in the Commission] to suspend proposed rates." The *Arrow* Court was asked to extend by injunction the statutory seven-month suspension period, see 49 U. S. C. § 15 (7), because the Commission had not reached a decision on the lawfulness of the proposed rates at the end of the suspension period and the rail carriers, following a period of voluntary suspension, were threatening to implement the rate change without awaiting final agency action. Despite the ambiguity of the legislative history, the Court, upon careful examination of the character of and reasons for the suspension scheme, concluded that Congress must have intended to deprive the federal courts of the power to suspend rates pending completion of agency action and thus that the traditional equitable powers of the federal courts had been overridden to that extent. But, as detailed consideration of the factors that motivated the decision in *Arrow* reveals, this litigation presents a significantly different problem.

The *Arrow* Court felt that an injunction extending the suspension period pending final agency action would involve a serious, unintended intrusion on the primary jurisdiction of the Commission. This problem of primary jurisdiction had two aspects in *Arrow*. First, where the issue is the reasonableness of proposed rates, an application for an injunction against implementation of

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judicial power that had been explicitly eliminated by Congress." *Ante*, at 696. That is a question which I do not believe need ever be reached here, for—as shall be seen—Congress has not, to begin with, deprived the federal courts of their traditional equitable powers in the context of these cases.

those rates pending final agency action would necessarily require a federal court "to pass before final Commission action upon the question of reasonableness of a rate," 372 U. S., at 671, thereby providing, in effect, an advisory judicial opinion to the Commission on an issue which Congress intended that the Commission decide in the first instance. Certainly, the Commission's expertise in matters of rail carrier operations and economics is well recognized, and *Arrow* clearly indicates that the courts should not interfere with the exercise of that expertise. However, the grant of preliminary relief here involves no such interference with the Commission's initial exercise of its particular expertise.

So far as I am aware, the Commission has never been deemed especially expert in matters of environmental policy or impact.[5] It is, of course, true that the Commission must decide in the first instance whether particular proposed action constitutes "major Federal action significantly affecting the quality of the human environment," thus necessitating agency compliance with the detailed requirements of § 102 (2)(C) of NEPA, 42 U. S. C. § 4332 (2)(C). But that decision had already been made in this case *prior to* the time when judicial intervention by the District Court was sought—in contrast to the situation in *Arrow* where the question of the reasonableness of the rates remained unresolved by the Commission. Even assuming that some element of agency expertise is involved in the decision at issue here, the District Court, in granting preliminary relief against the interim surcharge, passed only upon a question of which the Commission had finally disposed, namely, the environmental impact of not suspending the interim sur-

[5] Administrative expertise in such matters is surely lodged with the Environmental Protection Agency and the Council on Environmental Quality.

charge and of permitting it to take effect at once. Thus, for purposes of the particular issue raised here, the District Court was presented with final agency action [6] and was not in danger of interfering with the Commission's expertise when it stayed the Commission's order pending final determination of the appeals.[7]

The other aspect of the problem of primary jurisdiction focused upon in *Arrow* was the timing of the implementation of new rates. The Court concluded that Congress had intended that the Commission should determine when new rates should take effect. See 372 U. S., at 668. Insofar as the economic impact of rate increases was concerned, Congress enacted a scheme which permitted the Commission to take into account the interests of both rail carriers and shippers. Thus, Congress recognized that economic necessity might persuade the Commission to permit otherwise questionable rates to go unsuspended while they were being investigated, and, at most, it allowed the Commission to suspend proposed rates for only seven months, see 49 U. S. C. § 15 (7). At the same time, Congress attempted to accommodate the economic interests of shippers, for it gave the Commission power, pending final agency action, to require the rail carriers to maintain detailed records of monies received due to the increase and to compel payment of refunds if a rate increase was ultimately found to be unreasonable.[8] See *ibid.*

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[6] Cf. L. Jaffe, Judicial Control of Administrative Action 688 (1965).

[7] Contrast *Atchison, T. & S. F. R. Co.* v. *Wichita Board of Trade*, *post*, p. 800.

[8] Moreover, even if the Commission fails to require recordkeeping and the payment of refunds *sua sponte*, Congress also provided a mechanism by which shippers may initiate an action before the Commission to seek reparations from a carrier on the ground that particular rates are unreasonable. See 49 U. S. C. § 13 (1).

Arrow Transportation Co. v. *Southern R. Co.*, 372 U. S. 658

But where does the Interstate Commerce Act make provision for an accounting and "refund" to the people of our Nation for the irreversible ecological damage that results from a rate increase which discriminates unreasonably against recyclable materials and has been allowed to take effect without compliance with the procedural requirements of NEPA?[9] The Court today says that "[t]o allow judicial suspension for noncompliance with NEPA, would disturb the careful balance of interests" struck by Congress in the suspension and refund provisions. *Ante,* at 697. Yet the simple fact is that in the

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(1963), to be sure, did not involve an economic dispute between shippers and rail carriers, but was, instead, an action brought by water carriers which contended that certain challenged decreases in the rates of competing rail carriers were designed to destroy them rather than to reach legitimate economic objectives. Obviously, the refund and reparation provisions of the Interstate Commerce Act were of no more value to the water carriers in *Arrow* than they are to the nonshipper appellees in this case. But, as the Court pointed out in *Arrow,* "[c]onflicts over rates between competing carriers were familiar to the Commission long before [the enactment of the suspension provisions] . . . . Indeed, in another provision [namely, 49 U. S. C. § 4 (2)] of the very same statute [that established the suspension powers] Congress . . . dealt explicitly with the *reduction* of rates by railroads competing with water carriers . . . . In addition § 8 of the Act, 49 U. S. C. § 8, creates a private right of action for damages—based upon conduct violative of the Act—which might be available . . . ." 372 U. S., at 669. Thus, Congress had taken into account, and had provided for, disputes between competing carriers, as well as between shippers and carriers, in enacting the suspension provisions. The same can hardly be said for conflicts between the environmental policies of NEPA and the Commission's suspension power.

[9] Indeed, given the substantial element of public interest at stake in a case such as this, it is appropriate to recall Mr. Justice Stone's oft-quoted admonition: "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian R. Co.* v. *Systems Federation No. 40,* 300 U. S. 515, 552 (1937).

carefully designed suspension and refund scheme no balance was struck with respect to the environmental interests that have been recognized by Congress in NEPA *since* the introduction of the suspension provisions into the Interstate Commerce Act. Under these circumstances, we can hardly infer an intent on the part of Congress to deprive the federal courts of their traditional responsibility, in passing upon a request for equitable relief, to work an accommodation in each particular case of the competing interests of the relevant parties[10]—that is, of a rail carrier's alleged need for increased income that will otherwise be forever lost each day that the new rate is not charged and of the extent of irreversible environmental damage that might result if the rates are not suspended. The District Court, in its effort to preserve the *status quo* pending final review of the Commission's April 24 order, gave full consideration to the effects on all parties of either granting or denying preliminary relief against the interim surcharge.[11] In then temporarily enjoining the surcharge, I believe that the District Court acted within the scope of its legitimate powers.

To summarize, then, I obviously cannot agree with the Court's assertion that "each of the policies that we identified in *Arrow* as the basis for § 15 (7) would be substantially undermined if the courts were found to have suspension powers simply because noncompliance with NEPA was alleged." *Ante*, at 696. In *Arrow* itself, the Court was at pains to point out that its deci-

[10] Cf. *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329–330 (1944).

[11] Thus, the District Court, fully recognizing the financial plight of the rail carriers, carefully limited its preliminary injunction to the application of the interim surcharge to recyclable materials, "allowing [the rail carriers] to collect the surcharge on all nonrecyclable goods." 346 F. Supp., at 202.

sion did not "reflect in any way upon decisions which have recognized a limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels." 372 U. S., at 671 n. 22. True, the Court went on to say there that "[s]uch power . . . has never been recognized in derogation of such a clear congressional purpose to oust judicial power as that manifested in the Interstate Commerce Act." *Ibid.* But the import of that remark must be judged with a full understanding of the factors underlying the *Arrow* Court's finding of "such a clear congressional purpose." As has been seen, close analysis of those factors identified certainly does not compel extension of the *Arrow* holding to the request for preliminary injunctive relief in this litigation.[12] The Court would do well to re-

[12] The *Arrow* Court also pointed out that experience with judicial injunctions against rates prior to the establishment of the Commission's suspension powers in § 15 (7) had "resulted in disparity of treatment as between different shippers, carriers, and sections of the country, causing in turn 'discrimination and hardship to the general public.'" 372 U. S., at 664. These results were due both to the conflicting views of lower federal courts as to their power to enjoin rates pending agency determination of their lawfulness and conflicting judgments of different courts as to the reasonableness of the same rates. See *id.*, at 663–664. But the danger of conflicting judgments concerning the same rates and unevenhanded treatment of shippers and carriers, merely because of the fortuity of the particular judicial district in which they are located, is not present where, as here, the allegation is that the Commission has failed to follow the requirements of a statute—NEPA—relevant to the exercise of its regulatory jurisdiction and the Commission has, as a consequence, been joined in the suit as a defendant. So long as the Commission has been made a party, it is possible to ensure uniformity of treatment by enjoining the Commission to exercise its suspension powers where a failure to comply with NEPA is believed to exist. This is what the District Court did here when it enjoined the Commission "from permitting . . . the 2.5 per cent surcharge" to be collected by the rail

member that "[w]here Congress wished to deprive the courts of [their] historic power [to enjoin orders pending review], it knew how to use apt words . . . ." *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U. S., at 17. Cf. *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329 (1944). Nothing in the language of the Interstate Commerce Act or in the particular structure of that Act or even in our decision in *Arrow* compels the conclusion that Congress has done so here. I must therefore dissent from the Court's ultimate disposition of these cases.

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carriers "pending further order of this court." See Jurisdictional Statement 30a. It may be that the danger of conflicting results where the Commission has not been made a party would warrant a court staying its hand, but that is not a problem here.

GAFFNEY *v.* CUMMINGS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

No. 71–1476. Argued February 26–27, 1973—Decided June 18, 1973

Connecticut's legislative apportionment plan was held by the District Court to be unconstitutional because partisan political structuring had resulted in excessive population deviations in the House districting. *Held:*

1. Minor deviations from mathematical equality among state legislative districts do not make out a prima facie case of invidious discrimination under the Equal Protection Clause of the Fourteenth Amendment, and in this case, where the House districts deviated on the average by 1.9% and the maximum deviation was 7.83%, a prima facie case was not made out. Pp. 740–751.

2. A "political fairness principle" that achieves a rough approximation of the statewide political strengths of the two major parties does not violate the Equal Protection Clause. Pp. 751–754.

341 F. Supp. 139, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 772.

Robert G. Dixon, Jr., argued the cause for appellant. With him on the briefs were *Harry W. Hultgren, Jr.*, *Francis J. McCarthy*, and *Gordon W. Hatheway, Jr.*

Robert A. Satter argued the cause for appellees. With him on the brief was *James A. Wade.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The questions in this case are whether the population variations among the election districts provided by a reapportionment plan for the Connecticut General Assembly, proposed in 1971, made out a prima facie

case of invidious discrimination under the Equal Protection Clause and whether an otherwise acceptable reapportionment plan is constitutionally vulnerable where its purpose is to provide districts that would achieve "political fairness" between the political parties.

I

The reapportionment plan for the Connecticut General Assembly became law when published by Connecticut's Secretary of State in December 1971. Under the State's Constitution, the legislature is given the initial opportunity to reapportion itself in the months immediately following the completion of a decennial census of the United States. Conn. Const., Art. III, § 6 (b). In the present case, the legislature was unable to agree on a plan by the state constitutional deadline of April 1, 1971. The task was therefore transferred, as required by the constitution, to an eight-member bipartisan commission. *Ibid.* The Democratic and Republican Party leaders in the legislature each appointed four commissioners. The commission was given until July 1, 1971, to devise a reapportionment plan, *id.*, § 6 (c); but, although the commission approached agreement, it too was unable to adopt a plan within the deadline. Accordingly, as a final step in the constitutional process, a three-man bipartisan Board was constituted. *Id.*, § 6 (d). The Speaker of the House of Representatives, a Democrat, and the Republican Minority Leader of the House each chose a judge of the State Superior Court to be a Board member, and the two judges in turn designated a third Board member, who was a justice of the State Supreme Court. *Ibid.*

This Apportionment Board, using the census data available during the summer of 1971, and relying heavily on the legislative commission's tentative plans, filed a

reapportionment plan on September 30, 1971, with one member dissenting.

According to the 1970 census data before the Board, the population of Connecticut is 3,032,217. The Board's reapportionment plan provides for a Senate consisting of 36 senators elected from single-member districts. The ideal senatorial district, in terms of population, would thus contain 84,228 people. The districts actually created deviate, on the average, by 0.45% from this ideal, the median deviation being 0.47%. The largest and smallest senatorial districts deviate by +0.88% and −0.93%, respectively, making the total maximum deviation 1.81%.[1]

The reapportionment plan proposed a House of 151 single-member districts. The population of the ideal assembly district would be 20,081. The average deviation from perfect equality for all the plan's assembly districts is 1.9%, the median deviation, 1.8%. The maximum deviation from the ideal is +3.93% and −3.9%. The maximum deviation between any two districts thus totals 7.83%.[2]

In Connecticut, towns rather than counties are the basic unit of local government. See *Butterworth* v. *Dempsey*, 229 F. Supp. 754, 761 (Conn.), aff'd, 378 U. S. 564 (1964). The State Constitution provides that "no town shall be divided" for the purpose of creating House districts, except where districts are formed "wholly within the town." Art. III, § 4. No comparable directive exists for the creation of Senate districts. The Constitution further provides, however, that the "establishment of districts . . . shall be consistent with federal

[1] The ratio of the largest Senate district to the smallest is 1.018 to 1.

[2] The ratio of the largest assembly district to the smallest is 1.082 to 1.

constitutional standards." *Id.*, § 5. To meet those standards and to reach what it thought to be substantial population equality, the Board cut the boundary lines of 47 of the State's 169 towns.[3] The Board also consciously and overtly adopted and followed a policy of "political fairness," which aimed at a rough scheme of proportional representation of the two major political parties. Senate and House districts were structured so that the composition of both Houses would reflect "as closely as possible . . . the actual [statewide] plurality of vote on the House or Senate lines in a given election."[4] Rather than focusing on party membership in the respective districts, the Board took into account the party voting results in the preceding three statewide elections, and, on that basis, created what was thought to be a proportionate number of Republican and Democratic legislative seats.

In November 1971, not long after the Board filed the reapportionment plan with the Secretary of the State, an action was brought in federal district court seeking declaratory and injunctive relief against implementation of the plan. The complaint alleged that the Board "erroneously applied the one man-one vote doctrine of the Fourteenth Amendment . . . to achieve smaller deviations from population equality for the assembly dis-

[3] Some town boundaries were cut more than once, resulting in what the parties have termed "town segments," or portions of a town that were used to form an assembly district not wholly within that town. The Board's plan creates 78 such segments in the formation of the 151 assembly districts.

[4] Testimony of Judge George A. Saden, the Republican Board member. App. 264. According to Mr. James F. Collins, a staff member of the Board, the plan for the House resulted in approximately 70 safe Democratic seats, 55 to 60 safe Republican seats, with the balance characterized as probable or swing Democratic or Republican or "just plain swing," 341 F. Supp. 139, 147. See App. 126–127.

tricts than was required by the Fourteenth Amendment . . . and thereby was compelled to segment an excessive number of towns in forming assembly districts." The complaint further alleged the plan amounted to a political gerrymander and contained "a built-in bias in favor of the Republican Party." Appellant Gaffney, the Chairman of the State Republican Party, was permitted to intervene in support of the Board's plan and, after a three-judge court was empaneled, the court heard testimony in March 1972. At the hearing, plaintiff-appellees introduced three alternative House apportionment plans that required fewer town-line cuts, although all three plans involved total deviations from population equality in excess of those contained in the Board plan.[5] A fourth plan for the House was submitted with a total maximum deviation from population equality among districts of 2.61%, as compared with the Board plan, which contained a 7.83% total maximum deviation. This alternative plan, however, was prepared without regard for town lines, which were cut substantially more times than in the Board plan.[6] Considerable evidence was introduced demonstrating the obvious political considerations in the Board's district making.[7] In late March, the District Court filed its decision invalidating the Board plan and permanently enjoining its use in future elections. 341 F. Supp. 139. The court held that "the deviations

[5] The Board's Senate plan was not challenged in the District Court and no alternative Senate plan was introduced. Appellees do not challenge the Senate districts on the ground of their population deviations. Brief for Appellees 14 n. 4; Tr. of Oral Arg. 20.

[6] Plaintiff-appellees' plan resulted in 58 town-line cuts and 88 town segments, as opposed to the corresponding figures of 47 and 78 in the Board's plan.

[7] Plaintiff-appellees further offered testimony illustrating the undesirability—in the context of the State's administrative apparatus—of excessive cutting of town lines.

from equality of populations of the Senate and House districts are not justified by any sufficient state interest and that the Plan denies equal protection of the law to voters in the districts of greater population . . . ." *Id.*, at 148. The court relied in part on *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969). More particularly, the court found that the policy of "partisan political structuring," 341 F. Supp., at 150, "cannot be approved as a legitimate reason for violating the requirement of numerical equality of population in districting." *Id.*, at 149. The court therefore required that a plan reflecting "closer adherence to the constitutional guidelines" be adopted. Jurisdiction over the case was retained for all purposes, and the court announced that it "will appoint a master . . . to devise a plan conforming to federal and state constitutional requirements . . . ." *Id.*, at 150.

On June 12, 1972, after a motion to expedite consideration of the appeal had been denied (406 U. S. 942), this Court granted appellant's motion for a stay of the District Court's judgment. 407 U. S. 902. On the basis of that stay, and a subsequent supportive state order,[8] the 1972 fall elections for the State Assembly were held under the Board's reapportionment plan. When this Court convened in October 1972, we noted probable jurisdiction over the appeal. 409 U. S. 839. By this time, a Special Master had been appointed by the District Court and had prepared a reapportionment plan.

II

We think that appellees' showing of numerical deviations from population equality among the Senate and

[8] The order was entered in a parallel state proceeding, *Miller* v. *Schaffer*, No. 173606, Super. Ct., Hartford County, filed November 12, 1971, which was directed at correcting certain clerical errors or omissions in the Board's plan.

House districts in this case failed to make out a prima facie violation of the Equal Protection Clause of the Fourteenth Amendment, whether those deviations are considered alone or in combination with the additional fact that another plan could be conceived with lower deviations among the State's legislative districts. Put another way, the allegations and proof of population deviations among the districts fail in size and quality to amount to an invidious discrimination under the Fourteenth Amendment which would entitle appellees to relief, absent some countervailing showing by the State.

The requirement of Art. I, § 2, of the Constitution, that representatives be chosen "by the People of the several States," mandates that "one man's vote in a congressional election is to be worth as much as another's." *Wesberry* v. *Sanders,* 376 U. S. 1, 8 (1964) (footnote omitted). This standard "permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *Kirkpatrick* v. *Preisler,* 394 U. S., at 531. In *Kirkpatrick* and in *Wells* v. *Rockefeller,* 394 U. S. 542 (1969), the Court found inconsistent with this standard state statutes creating congressional districts having total maximum deviations of 5.97% and 13.1%, respectively. It is the standard of these cases which is the prevailing rule under Art. I and which we confirm in *White* v. *Weiser, post,* p. 783, today, for the purposes of congressional reapportionment.

Earlier this Term, the question arose whether the same standard is applicable when reviewing state legislative reapportionments under the Equal Protection Clause of the Fourteenth Amendment. *Mahan* v. *Howell,* 410 U. S. 315 (1973). We concluded that there are fundamental differences between congressional districting under Art. I and the *Wesberry* line of cases on the one hand, and, on the other, state legislative reappor-

tionments governed by the Fourteenth Amendment and *Reynolds* v. *Sims*, 377 U. S. 533 (1964), and its progeny. Noting that the "dichotomy between the two lines of cases has consistently been maintained," 410 U. S., at 322, we concluded that "the constitutionality of Virginia's legislative redistricting plan was not to be judged by the more stringent standards that *Kirkpatrick* and *Wells* make applicable to congressional reapportionment, but instead by the equal protection test enunciated in *Reynolds* v. *Sims*," *id.*, at 324, that test being that districts in state reapportionments be "as nearly of equal population as is practicable," *Reynolds, supra*, at 577, and that "[s]o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature." *Id.*, at 579. In *Mahan*, the ideal district was 46,485 persons per delegate. The maximum variation from the ideal was 16.4%—"the 12th district being overrepresented by 6.8% and the 16th district being underrepresented by 9.6%." 410 U. S., at 319 (footnote omitted). The average percentage variation under the plan was ±3.89%. Of the 52 house districts, 35 were within 4% of the ideal district, and nine exceeded a 6% variation from the ideal.

The asserted justification for the divergencies in *Mahan* was "the State's policy of maintaining the integrity of political subdivision lines," *id.*, at 325, a policy we found to be rational and wholly sufficient to justify the district population disparities of the size and quality that had been found to exist. We ruled that the "relatively minor variations present in the Virginia plan contrast sharply with the larger variations in state legislative reapportionment plans that have been struck

down by previous decisions of this Court," *id.*, at 329, and that "Virginia has not sacrificed substantial equality to justifiable deviations." *Ibid.*

Although requiring that the population variations among legislative districts in *Mahan* be justified by substantial state considerations, we did not hold that in state legislative cases any deviations from perfect population equality in the districts, however small, make out prima facie equal protection violations and require that the contested reapportionments be struck down absent adequate state justification. Nor had we so held in any prior state reapportionment case. *Swann* v. *Adams,* 385 U. S. 440 (1967), and *Kilgarlin* v. *Hill,* 386 U. S. 120 (1967), required state justification of population variations found in state legislative reapportionments, but the variations involved in each of these cases exceeded those we dealt with in *Mahan.*

In the case now before us, appellant urges that the population variations among Senate and House districts in the Board plan did not in and of themselves demonstrate an equal protection violation and that the State was not required to justify them, absent further proof of invidiousness by appellees. For several reasons we think the point is well taken and that the District Court erred in holding to the contrary.

As we noted in *Mahan* v. *Howell, Reynolds* v. *Sims* recognized that a State must make an honest and good-faith effort to construct its districts "as nearly of equal population as is practicable," but that absolute equality was a "practical impossibility": "Mathematical exactness or precision is hardly a workable constitutional requirement." 377 U. S., at 577. Moreover, the *Reynolds* court also noted that "some distinctions may well be made between congressional and state legislative representation," and that "[s]omewhat more flexibility may therefore be constitutionally permissible with respect to

state legislative apportionment than in congressional districting." *Id.*, at 578. All that would be required was "substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.*, at 579. In other words, "[s]imply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Id.*, at 568.

As these pronouncements have been worked out in our cases, it has become apparent that the larger variations from substantial equality are too great to be justified by any state interest so far suggested. There were thus the enormous variations struck down in the early cases beginning with *Reynolds* v. *Sims*,[9] as well as the much smaller, but nevertheless unacceptable deviations, appearing in later cases such as *Swann* v. *Adams*, 385 U. S. 440 (1967); *Kilgarlin* v. *Hill*, 386 U. S. 120 (1967); and *Whitcomb* v. *Chavis*, 403 U. S. 124, 161–163 (1971).

[9] *Reynolds* v. *Sims* involved the Alabama State Legislature, which had not reapportioned itself in over 60 years. Under the apportionment existing in 1964, some senatorial districts with the same number of representatives had over 40 times more people than others. House districts with identical representation could vary by 16 to 1. In Maryland in 1964, some House districts with nominally equal representation could have six times more people than others, while senatorial districts could be 32 times larger than others. *Maryland Committee for Fair Representation* v. *Tawes*, 377 U. S. 656 (1964). The list may easily be expanded to include other States, and Connecticut is no exception. In 1964, the Connecticut towns of Hartford and Union had the same representation in the House, but Union had a population of 383 people, while Hartford had a population of 162,178. A vote in Union was thus weighted about 425 times more heavily than a vote in Hartford. At that time, it would have taken only 11.9% of Connecticut's population to elect a majority of its House, and only 31% to elect a Senate majority. See *Butterworth* v. *Dempsey*, 229 F. Supp. 754 (Conn.), aff'd, 378 U. S. 564 (1964).

On the other hand, as *Mahan* v. *Howell* demonstrates, population deviations among districts may be sufficiently large to require justification but nonetheless be justifiable and legally sustainable. It is now time to recognize, in the context of the eminently reasonable approach of *Reynolds* v. *Sims,* that minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.

We doubt that *Reynolds* would mandate any other result, if for no other reason than that the basic statistical materials which legislatures and courts usually have to work with are the results of the United States census taken at 10-year intervals and published as soon as possible after the beginning of each decade. These figures may be as accurate as such immense undertakings can be, but they are inherently less than absolutely accurate. Those who know about such things recognize this fact,[10] and, unless they are to be wholly ignored, it makes little sense

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[10] See, *e. g.*, H. Alterman, Counting People: The Census in History 262 (1969):

"A census, by its nature, can never be an exact count of a nation. This is especially true of the United States . . . . Thus, an error of 1 or 2 percent in the count of the total population is to be expected; professionally, it is regarded as an 'acceptable' error."

The Census Bureau estimates that the 1970 census had an undercoverage rate of 2.5%, or about 5,300,000 people. Address of J. S. Siegel, Population Association of America Annual Meeting, in New Orleans, La., Apr. 26, 1973. See N. Y. Times, Apr. 26, 1973, p. 1, col. 1.

Inexactness of census data is most evident with respect to minorities. It is estimated, for example, that Negroes were underenumerated in the 1970 census by 7.7%, as compared to an estimated 1.9% undercount for white persons. *Ibid.* See also Siegel, Completeness of Coverage of the Nonwhite Population in the 1960 Census and Current Estimates, and Some Implications, in Social Statistics and the City 13 (D. Heer ed. 1968).

to conclude from relatively minor "census population" variations among legislative districts that any person's vote is being substantially diluted. The "population" of a legislative district is just not that knowable to be used for such refined judgments.

What is more, it must be recognized that total population, even if absolutely accurate as to each district when counted, is nevertheless not a talismanic measure of the weight of a person's vote under a later adopted reapportionment plan. The United States census is more of an event than a process. It measures population at only a single instant in time. District populations are constantly changing, often at different rates in either direction, up or down. Substantial differentials in population growth rates are striking and well-known phenomena.[11] So, too, if it is the weight of a person's vote that matters, total population—even if stable and accurately taken—may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because "census persons" are not voters.[12] The proportion of the census

[11] See, *e. g.*, M. Spiegelman, Introduction to Demography 415–416 (1968); U. S. Bureau of the Census, 2 The Materials and Methods of Demography 806 (1971).

In Connecticut, for example, the population of the State as a whole grew by 19.6% during the 1960's. But the population in the area comprising the Second Congressional District grew by over 28%, while the population in the Fourth District grew by only 11.2%. The U. S. Bureau of the Census, Congressional District Data Book, 93d Congress, Connecticut 7 (1972).

[12] See *Burns* v. *Richardson*, 384 U. S. 73, 91–92 (1966):

"We start with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured. . . . Neither in *Reynolds* v. *Sims* nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or tem-

population too young to vote or disqualified by alienage or nonresidence varies substantially among the States and among localities within the States. The six congressional districts in Connecticut, for example, vary from one another by as much as 4% in their age-eligible voters, with the first district having 68% of its census population at voting age while the sixth district has 64% at 18 years or older. Bureau of the Census, Congressional District Data Book, 93d Congress, Connecticut 7–8 (1972). Other States have congressional districts that vary from one another by as much as 29% and as little as 1% with respect to their age-eligible voters.[13] And these figures tell us nothing of the other ineligibles making up the substantially equal census populations among election districts: aliens, nonresident military personnel, nonresident students, for example. See *Burns* v. *Richardson*, 384 U. S. 73, 90–97 (1966); *Davis* v. *Mann*, 377 U. S. 678, 691–692 (1964); *Ely* v. *Klahr*, 403 U. S. 108, 115–116, n. 7 (1971); *Mahan* v. *Howell*, 410 U. S., at 330–332. Nor do these figures tell anything at all about the proportion of all those otherwise eligible in-

porary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. Unless a choice is one the Constitution forbids, cf., *e. g.*, *Carrington* v. *Rash*, 380 U. S. 89, the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds* v. *Sims* is to be measured thereby."

[13] Utah, Rhode Island, New Hampshire, and Missouri have only 1% variations. New York has a 29% variation in age-eligible voters among its congressional districts, while California has a 25% and Illinois a 20% variation. These figures may be computed from the Bureau of the Census' Congressional District Data, 93d Congress, for the respective States.

dividuals whose vote cannot be counted or weighed because they either failed to register or failed to vote.[14]

Reynolds v. *Sims*, of course, dealt with more than the statistical niceties involved in equalizing individual voting strength. It argued that "if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted." 377 U. S., at 562. To conclude differently, "and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result." *Id.*, at 565. More fundamentally, *Reynolds* recognized that "the achieving of fair and effective representation for all citizens is . . . the basic aim of legislative apportionment," *id.*, at 565–566, and it was for that reason that the decision insisted on substantial equality of populations among districts.

This is a vital and worthy goal, but surely its attainment does not in any commonsense way depend upon eliminating the insignificant population variations involved in this case. Fair and effective representation may be destroyed by gross population variations among districts, but it is apparent that such representation does not depend solely on mathematical equality among dis-

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[14] Again using Connecticut congressional districts as an example, in the November 1972 elections, the percentage of registered voters who actually voted varied by a maximum of 2.8%. See Statement of Vote, General Election Nov. 7, 1972, State of Conn. Pub. Doc. No. 26, p. 72 (1973). The percentages of registered voters who voted varied by as much as about 23% among the towns in the State. *Id.*, at 65–71.

trict populations.[15] There are other relevant factors to be taken into account and other important interests that States may legitimately be mindful of. See *Mahan* v. *Howell, supra; Abate* v. *Mundt,* 403 U. S. 182 (1971); *Dusch* v. *Davis,* 387 U. S. 112 (1967); *Sailors* v. *Board of Education,* 387 U. S. 105 (1967); *Burns* v. *Richardson, supra.* An unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement.

Nor is the goal of fair and effective representation furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and performed by federal courts which themselves must make the political decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs who may have wholly different goals from those embodied in the official plan. From the very outset, we recognized that the apportionment task, dealing as it must with fundamental "choices about the nature of representation," *Burns* v. *Richardson,* 384 U. S., at 92, is primarily a political and legislative process. *Reynolds* v. *Sims,* 377 U. S., at 586. We doubt that the Fourteenth Amendment requires repeated displacement of otherwise appropriate state decisionmaking in the name of essentially minor deviations from perfect census-population equality that no one, with confidence, can say will deprive any person of fair and effective representation in his state legislature.

That the Court was not deterred by the hazards of the

[15] For discussions of the vast and growing literature in this area, see Reapportionment in the 1970s (N. Polsby ed. 1971).

political thicket when it undertook to adjudicate the reapportionment cases does not mean that it should become bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so.

This very case represents what should not happen in the federal courts. The official state functionaries proposed a plan with a maximum variation among the districts of 7.83% in the House and 1.81% in the Senate, and with respective average variations of 1.90% and .45%. Appellees then proposed four alternate plans for the House, three of which involved slightly larger variations among districts but cut fewer town lines. The fourth cut more lines, but had a maximum variation between its largest and smallest district of only 2.6%. The District Court thought the state plan involved unacceptably large variations between districts, although in the House, with districts of about 20,000 people, the average variation involved only 399 people, and the largest variations involved only 1,573 people.[16] But neither did the District Court adopt any of the plans submitted by appellees. Instead, it appointed its own Master to come up with still another scheme. That plan, we are told, involves a total maximum deviation in the House of only 1.16%.[17] Was the Master compelled, as a federal constitutional matter, to come up with a plan with smaller variations than were contained in appellees' plans? And what is to happen to the Master's plan if a resourceful mind hits upon a plan better than the Master's by a fraction of a percentage point? Involvements like this must end at some point, but that point constantly recedes if those

[16] Among the Senate districts (of about 84,000 people each), the average deviation involves only about 400 people and the maximum deviation only 1,532 people.

[17] Reply Brief for Appellant 19. Apparently, more refined census data were available to the Master in preparing this later plan.

who litigate need only produce a plan that is marginally "better" when measured against a rigid and unyielding population-equality standard.

The point is, that such involvements should never begin. We have repeatedly recognized that state reapportionment is the task of local legislatures or of those organs of state government selected to perform it. Their work should not be invalidated under the Equal Protection Clause when only minor population variations among districts are proved. Here, the proof at trial demonstrated that the House districts under the State Apportionment Board's plan varied in population from one another by a *maximum* of only about 8% and that the average deviation from the ideal House district was only about 2%. The Senate districts had even less variations. On such a showing, we are quite sure that a prima facie case of invidious discrimination under the Fourteenth Amendment was not made out.

III

State legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment. A districting statute otherwise acceptable, may be invalid because it fences out a racial group so as to deprive them of their pre-existing municipal vote. *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960). A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed "to minimize or cancel out the voting strength of racial or political elements of the voting population." *Fortson* v. *Dorsey,* 379 U. S. 433, 439 (1965). See *White* v. *Regester, post,* p. 755; *Whitcomb* v. *Chavis,* 403 U. S. 124 (1971); *Abate* v. *Mundt,* 403 U. S., at 184 n. 2; *Burns* v. *Richardson,* 384 U. S., at 88–89. We must, therefore, respond to appellees' claims in this case

that even if acceptable populationwise, the Apportionment Board's plan was invidiously discriminatory because a "political fairness principle" was followed in making up the districts in both the House and Senate.

The record abounds with evidence, and it is frankly admitted by those who prepared the plan, that virtually every Senate and House district line was drawn with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties, the only two parties in the State large enough to elect legislators from discernible geographic areas. Appellant insists that the spirit of "political fairness" underlying this plan is not only permissible, but a desirable consideration in laying out districts that otherwise satisfy the population standard of the reapportionment cases. Appellees, on the other hand, label the plan as nothing less than a gigantic political gerrymander, invidiously discriminatory under the Fourteenth Amendment.[18]

We are quite unconvinced that the reapportionment plan offered by the three-member Board violated the Fourteenth Amendment because it attempted to reflect the relative strength of the parties in locating and defining election districts. It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. Our cases indicate quite the contrary.

[18] Appellees also maintain that the shapes of the districts would not have been so "indecent" had the Board not attempted to "wiggle and joggle" boundary lines to ferret out pockets of each party's strength. That may well be true, although any plan that attempts to follow Connecticut's "oddly shaped" town lines (App. 98) is bound to contain some irregularly shaped districts. But compactness or attractiveness has never been held to constitute an independent federal constitutional requirement for state legislative districts. Cf. *White* v. *Weiser*, *post*, p. 783; *Wright* v. *Rockefeller*, 376 U. S. 52, 54 (1964), and *id.*, at 59–61 (DOUGLAS, J., dissenting).

See *White* v. *Regester, supra; Burns* v. *Richardson, supra; Whitcomb* v. *Chavis, supra; Abate* v. *Mundt, supra.* The very essence of districting is to produce a different—a more "politically fair"—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats. Politics and political considerations are inseparable from districting and apportionment. The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. These subdivisions may not be identical with census tracts, but, when overlaid on a census map, it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences.

It may be suggested that those who redistrict and reapportion should work with census, not political, data and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results; and, in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended.

It is much more plausible to assume that those who redistrict and reapportion work with both political and

census data. Within the limits of the population equality standards of the Equal Protection Clause, they seek, through compromise or otherwise, to achieve the political or other ends of the State, its constituents, and its officeholders. What is done in so arranging for elections, or to achieve political ends or allocate political power, is not wholly exempt from judicial scrutiny under the Fourteenth Amendment. As we have indicated, for example, multimember districts may be vulnerable, if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized. See *White* v. *Regester, supra; Whitcomb* v. *Chavis, supra.* See also *Gomillion* v. *Lightfoot, supra.* Beyond this, we have not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States. Even more plainly, judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so. There is no doubt that there may be other reapportionment plans for Connecticut that would have different political consequences and that would also be constitutional. Perhaps any of appellees' plans would have fallen into this category, as would the court's, had it propounded one. But neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.

Reversed.

[For dissenting opinion of MR. JUSTICE BRENNAN, see *post,* p. 772.]

WHITE, SECRETARY OF STATE OF TEXAS, ET AL. *v.* REGESTER ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. 72–147. Argued February 26, 1973—Decided June 18, 1973

In this litigation challenging the Texas 1970 legislative reapportionment scheme, a three-judge District Court held that the House plan, statewide, contained constitutionally impermissible deviations from population equality, and that the multimember districts provided for Bexar and Dallas Counties invidiously discriminated against cognizable racial or ethnic groups. Though the entire plan was declared invalid, the court permitted its use for the 1972 election except for its injunction order requiring those two county multimember districts to be reconstituted into single-member districts. *Held:*

1. This Court has jurisdiction under 28 U. S. C. § 1253 to consider the appeal from the injunction order applicable to the Bexar County and Dallas County districting, since the three-judge court had been properly convened, and this Court can review the declaratory part of the judgment below. *Roe* v. *Wade,* 410 U. S. 113. Pp. 759–761.

2. State reapportionment statutes are not subject to the stricter standards applicable to congressional reapportionment under Art. I, § 2, and the District Court erred in concluding that this case, where the total maximum variation between House districts was 9.9%, but the average deviation from the ideal was 1.82%, involved invidious discrimination in violation of the Equal Protection Clause. Cf. *Gaffney* v. *Cummings, ante,* p. 735. Pp. 761–764.

3. The District Court's order requiring disestablishment of the multimember districts in Dallas and Bexar Counties was warranted in the light of the history of political discrimination against Negroes and Mexican-Americans residing, respectively, in those counties and the residual effects of such discrimination upon those groups. Pp. 765–770.

343 F. Supp. 704, affirmed in part, reversed in part, and remanded.

WHITE, J., delivered the opinion of the Court, in Parts I, III, and IV of which all Members joined, and in Part II of which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST,

JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 772.

Leon Jaworski, Special Assistant Attorney General of Texas, argued the cause for appellants. With him on the briefs were *John L. Hill*, Attorney General, *Larry York*, Executive Assistant Attorney General, *Alton F. Curry*, Special Assistant Attorney General, and *Lewis A. Jones*, Assistant Attorney General.

David R. Richards argued the cause for appellees Regester et al. With him on the brief were *Ronald L. Clower* and *James A. Mattox*. *Ed Idar, Jr.*, argued the cause for appellees Bernal et al. With him on the brief were *Mario Obledo*, *George J. Korbel*, and *Frank Hernandez*. *Thomas Gibbs Gee* argued the cause for appellees Willeford et al. With him on the brief was *William Terry Bray*. *J. Douglas McGuire* filed a brief for appellees Van Henry Archer, Jr., et al. *D. Marcus Ranger* and *E. Brice Cunningham* filed a brief for appellees Washington et al.*

MR. JUSTICE WHITE delivered the opinion of the Court.

This case raises two questions concerning the validity of the reapportionment plan for the Texas House of Representatives adopted in 1970 by the State Legislative Redistricting Board: First, whether there were unconstitutionally large variations in population among the districts defined by the plan; second, whether the multimember districts provided for Bexar and Dallas Counties were properly found to have been invidiously discriminatory against cognizable racial or ethnic groups in those counties.

**William A. Dobrovir* filed a brief for League of Women Voters of the United States et al. as *amici curiae* urging affirmance.

The Texas Constitution requires the state legislature to reapportion the House and Senate at its first regular session following the decennial census. Tex. Const., Art. III, § 28.[1] In 1970, the legislature proceeded to reapportion the House of Representatives but failed to agree on a redistricting plan for the Senate. Litigation

[1] Article III, § 28, of the Texas Constitution provides:

"The Legislature shall, at its first regular session after the publication of each United States decennial census, apportion the state into senatorial and representative districts, agreeable to the provisions of Sections 25, 26, and 26–a of this Article. In the event the Legislature shall at any such first regular session following the publication of a United States decennial census, fail to make such apportionment, same shall be done by the Legislature Redistricting Board of Texas, which is hereby created, and shall be composed of five (5) members, as follows: The Lieutenant Governor, the Speaker of the House of Representatives, the Attorney General, the Comptroller of Public Accounts and the Commissioner of the General Land Office, a majority of whom shall constitute a quorum. Said Board shall assemble in the City of Austin within ninety (90) days after the final adjournment of such regular session. The Board shall, within sixty (60) days after assembling, apportion the state into senatorial and representative districts, or into senatorial or representative districts, as the failure of action of such Legislature may make necessary. Such apportionment shall be in writing and signed by three (3) or more of the members of the Board duly acknowledged as the act and deed of such Board, and, when so executed and filed with the Secretary of State, shall have force and effect of law. Such apportionment shall become effective at the next succeeding statewide general election. The Supreme Court of Texas shall have jurisdiction to compel such Commission [Board] to perform its duties in accordance with the provisions of this section by writ of mandamus or other extraordinary writs conformable to the usages of law. The Legislature shall provide necessary funds for clerical and technical aid and for other expenses incidental to the work of the Board, and the Lieutenant Governor and the Speaker of the House of Representatives shall be entitled to receive per diem and travel expense during the Board's session in the same manner and amount as they would receive while attending a special session of the Legislature. This amendment shall become effective January 1, 1951. As amended Nov. 2. 1948."

was immediately commenced in state court challenging the constitutionality of the House reapportionment. The Texas Supreme Court held that the legislature's plan for the House violated the Texas Constitution.[2] *Smith* v. *Craddick*, 471 S. W. 2d 375 (1971). Meanwhile, pursuant to the requirements of the Texas Constitution, a Legislative Redistricting Board had been formed to begin the task of redistricting the Texas Senate. Although the Board initially confined its work to the reapportionment of the Senate, it was eventually ordered, in light of the judicial invalidation of the House plan, to also reapportion the House. *Mauzy* v. *Legislative Redistricting Board*, 471 S. W. 2d 570 (1971).

On October 15, 1971, the Redistricting Board's plan for the reapportionment of the Senate was released, and, on October 22, 1971, the House plan was promulgated. Only the House plan remains at issue in this case. That plan divided the 150-member body among 79 single-member and 11 multimember districts. Four lawsuits, eventually consolidated, were filed challenging the

[2] The Court held that the plan violated Art. III, § 26, of the Texas Constitution, which provides:

"The members of the House of Representatives shall be apportioned among the several counties, according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census, by the number of members of which the House is composed; provided, that whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate Representative District, and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties."

Board's Senate and House plans and asserting with respect to the House plan that it contained impermissible deviations from population equality and that its multimember districts for Bexar County and Dallas County operated to dilute the voting strength of racial and ethnic minorities.

A three-judge District Court sustained the Senate plan, but found the House plan unconstitutional. *Graves* v. *Barnes*, 343 F. Supp. 704 (WD Tex. 1972). The House plan was held to contain constitutionally impermissible deviations from population equality, and the multimember districts in Bexar and Dallas Counties were deemed constitutionally invalid. The District Court gave the Texas Legislature until July 1, 1973, to reapportion the House, but the District Court permitted the Board's plan to be used for purposes of the 1972 election, except for requiring that the Dallas County and Bexar County multimember districts be reconstituted into single-member districts for the 1972 election.

Appellants appealed the statewide invalidation of the House plan and the substitution of single-member for multimember districts in Dallas County and Bexar County.[3] MR. JUSTICE POWELL denied a stay of the judgment of the District Court, 405 U. S. 1201, and we noted probable jurisdiction *sub nom. Bullock* v. *Regester*, 409 U. S. 840.

I

We deal at the outset with the challenge to our jurisdiction over this appeal under 28 U. S. C. § 1253, which permits injunctions in suits required to be heard and determined by a three-judge district court to be ap-

[3] In a separate appeal, we summarily affirmed that portion of the judgment of the District Court upholding the Senate plan. *Archer* v. *Smith*, 409 U. S. 808 (1972).

pealed directly to this Court.[4] It is first suggested that the case was not one required to be heard by a three-judge court. The contention is frivolous. A statewide reapportionment statute was challenged and injunctions were asked against its enforcement. The constitutional questions raised were not insubstantial on their face, and the complaint clearly called for the convening of a three-judge court. That the court declared the entire apportionment plan invalid, but entered an injunction only with respect to its implementation for the 1972 elections in Dallas and Bexar Counties, in no way indicates that the case required only a single judge. Appellants are therefore properly here on direct appeal with respect to the injunction dealing with Bexar and Dallas Counties, for the order of the court directed at those counties was literally an order "granting . . . an . . . injunction in any civil action . . . required . . . to be heard and determined by a district court of three judges" within the meaning of § 1253.

We also hold that appellants, because they appealed from the entry of an injunction, are entitled to review of the District Court's accompanying declaration that the proposed plan for the Texas House of Representatives, including those portions providing for multimember districts in Dallas and Bexar Counties, was invalid statewide. This declaration was the predicate for the court's order requiring Dallas and Bexar Counties to be reapportioned into single districts; for its order that "unless the Legislature of the State of Texas on or before July 1, 1973, has adopted a plan to reapportion the legislative districts

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[4] Title 28 U. S. C. § 1253 provides:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

within the State in accordance with the constitutional guidelines set out in this opinion this Court will so reapportion the State of Texas"; and for its order that the Secretary of State "adopt and implement any and all procedures necessary to properly effectuate the orders of this Court in conformance with this Opinion . . . ." 343 F. Supp., at 737. In these circumstances, although appellants could not have directly appealed to this Court the entry of a declaratory judgment unaccompanied by any injunctive relief, *Gunn* v. *University Committee,* 399 U. S. 383 (1970); *Mitchell* v. *Donovan,* 398 U. S. 427 (1970), we conclude that we have jurisdiction of the entire appeal. *Roe* v. *Wade,* 410 U. S. 113 (1973); *Florida Lime & Avocado Growers* v. *Jacobsen,* 362 U. S. 73 (1960). With the Texas reapportionment plan before it, it was in the interest of judicial economy and the avoidance of piecemeal litigation that the three-judge District Court have jurisdiction over all claims raised against the statute when a substantial constitutional claim was alleged, and an appeal to us, once properly here, has the same reach. *Roe* v. *Wade, supra,* at 123; *Carter* v. *Jury Comm'n,* 396 U. S. 320 (1970); *Florida Lime & Avocado Growers* v. *Jacobsen, supra,* at 80.

II

The reapportionment plan for the Texas House of Representatives provides for 150 representatives to be selected from 79 single-member and 11 multimember districts. The ideal district is 74,645 persons. The districts range from 71,597 to 78,943 in population per representative, or from 5.8% overrepresentation to 4.1% underrepresentation. The total variation between the largest and smallest district is thus 9.9%[5]

The District Court read our prior cases to require any deviations from equal population among districts to be

[5] See Appendix to opinion of the Court, *post,* p. 770.

justified by "acceptable reasons" grounded in state policy; relied on *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969), to conclude that the permissible tolerances suggested by *Reynolds* v. *Sims*, 377 U. S. 533 (1964), had been substantially eroded; suggested that *Abate* v. *Mundt*, 403 U. S. 182 (1971), in accepting total deviations of 11.9% in a county reapportionment was *sui generis;* and considered the "critical issue" before it to be whether "the State [has] justified any and all variances, however small, on the basis of a consistent, rational State policy." 343 F. Supp., at 713. Noting the single fact that the total deviation from the ideal between District 3 and District 85 was 9.9%, the District Court concluded that justification by appellants was called for and could discover no acceptable state policy to support the deviations. The District Court was also critical of the actions and procedures of the Legislative Reapportionment Board and doubted "that [the] board did the sort of deliberative job . . . worthy of judicial abstinence." *Id.*, at 717. It also considered the combination of single-member and multimember districts in the House plan "haphazard," particularly in providing single-member districts in Houston and multimember districts in other metropolitan areas, and that this "irrationality, without reasoned justification, may be a separate and distinct ground for declaring the plan unconstitutional." [6] *Ibid.*

[6] It may be, although we are not sure, that the District Court would have invalidated the plan statewide because of what it thought was an irrational mixture of multimember and single-member districts. Thus, in questioning the use of single-member districts in Houston but multimember districts in all other urban areas, and remarking that the State had provided neither "compelling" nor "rational" explanation for the differing treatment, the District Court merely concluded that this classification "may be" an independent ground for invalidating the plan. But there are no authorities in this Court for the proposition that the mere mixture of multimember and single-member districts in a single plan, even among urban areas, is in-

Finally, the court specifically invalidated the use of multi-member districts in Dallas and Bexar Counties as unconstitutionally discriminatory against a racial or ethnic group.

The District Court's ultimate conclusion was that "the apportionment plan for the State of Texas is unconstitutional as unjustifiably remote from the ideal of 'one man, one vote,' and that the multi-member districting schemes for the House of Representatives as they relate specifically to Dallas and to Bexar Counties are unconstitutional in that they dilute the votes of racial minorities." *Id.*, at 735.[7]

Insofar as the District Court's judgment rested on the conclusion that the population differential of 9.9% from the ideal district between District 3 and District 85 made out a prima facie equal protection violation under the Fourteenth Amendment, absent special justification, the court was in error. It is plain from *Mahan* v. *Howell*, 410 U. S. 315 (1973), and *Gaffney* v. *Cummings*, *ante*, p. 735, that state reapportionment statutes are not subject to the same strict standards applicable to reapportionment of congressional seats. *Kirkpatrick* v. *Preisler* did not dilute the tolerances contemplated by *Reynolds* v. *Sims* with respect to state districting, and we did not hold in *Swann* v. *Adams*, 385 U. S. 440 (1967), or *Kilgarlin* v. *Hill*, 386 U. S. 120 (1967), or

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vidiously discriminatory, and we construe the remarks not as part of the District Court's declaratory judgment invalidating the state plan but as mere advance advice to the Texas Legislature as to what would or would not be acceptable to the District Court.

[7] The District Court also concluded, contrary to the assertions of certain plaintiffs, that the Senate districting scheme for Bexar County did not "unconstitutionally dilute the votes of any political faction or party." 343 F. Supp. 704, 735. The majority of the District Court also concluded that the Senate districting scheme for Harris County did not dilute black votes.

later in *Mahan* v. *Howell, supra,* that *any* deviations from absolute equality, however small, must be justified to the satisfaction of the judiciary to avoid invalidation under the Equal Protection Clause. For the reasons set out in *Gaffney* v. *Cummings, supra,* we do not consider relatively minor population deviations among state legislative districts to substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation. Those reasons are as applicable to Texas as they are to Connecticut; and we cannot glean an equal protection violation from the single fact that two legislative districts in Texas differ from one another by as much as 9.9%, when compared to the ideal district. Very likely, larger differences between districts would not be tolerable without justification "based on legitimate considerations incident to the effectuation of a rational state policy," *Reynolds* v. *Sims,* 377 U. S., at 579; *Mahan* v. *Howell, supra,* at 325, but here we are confident that appellees failed to carry their burden of proof insofar as they sought to establish a violation of the Equal Protection Clause from population variations alone. The total variation between two districts was 9.9%, but the average deviation of all House districts from the ideal was 1.82%. Only 23 districts, all single-member, were overrepresented or underrepresented by more than 3%, and only three of those districts by more than 5%. We are unable to conclude from these deviations alone that appellees satisfied the threshold requirement of proving a prima facie case of invidious discrimination under the Equal Protection Clause. Because the District Court had a contrary view, its judgment must be reversed in this respect.[8]

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[8] The court's conclusion that the variations in this case were not justified by a rational state policy would, in any event, require re-

III

We affirm the District Court's judgment, however, insofar as it invalidated the multimember districts in Dallas and Bexar Counties and ordered those districts to be redrawn into single-member districts. Plainly, under our cases, multimember districts are not *per se* unconstitutional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the State. *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971); *Mahan* v. *Howell*, *supra*; see *Burns* v. *Richardson*, 384 U. S. 73 (1966); *Fortson* v. *Dorsey*, 379 U. S. 433 (1965); *Lucas* v. *Colorado General Assembly*, 377 U. S. 713 (1964); *Reynolds* v. *Sims*, *supra*.[9] But we have entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups. See *Whitcomb* v. *Chavis*, *supra*; *Burns* v. *Richardson*, *supra*; *Fortson* v. *Dorsey*, *supra*. To sustain such claims, it is not enough that the racial group al-

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consideration and reversal under *Mahan* v. *Howell*, 410 U. S. 315 (1973). The Texas Constitution, Art. III, § 26, expresses the state policy against cutting county lines wherever possible in forming representative districts. The District Court recognized the policy but, without the benefit of *Mahan* v. *Howell*, may have thought the variations too great to be justified by that policy. It perhaps thought also that the policy had not been sufficiently or consistently followed here. But it appears to us that to stay within tolerable population limits it was necessary to cut some county lines and that the State achieved a constitutionally acceptable accommodation between population principles and its policy against cutting county lines in forming representative districts.

[9] See *Whitcomb* v. *Chavis*, 403 U. S. 124, 141–148 (1971), and the cases discussed in n. 22 of that opinion, including *Kilgarlin* v. *Hill*, 386 U. S. 120 (1967), where we affirmed the District Court's rejection of petitioners' contention that the combination of single-member, multimember, and floterial districts in a single reapportionment plan was "an unconstitutional 'crazy quilt.'" *Id.*, at 121.

legedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice. *Whitcomb* v. *Chavis, supra,* at 149–150.

With due regard for these standards, the District Court first referred to the history of official racial discrimination in Texas, which at times touched the right of Negroes to register and vote and to participate in the democratic processes. 343 F. Supp., at 725. It referred also to the Texas rule requiring a majority vote as a prerequisite to nomination in a primary election and to the so-called "place" rule limiting candidacy for legislative office from a multimember district to a specified "place" on the ticket, with the result being the election of representatives from the Dallas multimember district reduced to a head-to-head contest for each position. These characteristics of the Texas electoral system, neither in themselves improper nor invidious, enhanced the opportunity for racial discrimination, the District Court thought.[10] More fundamentally, it found that since Reconstruction days, there have been only two Negroes in the Dallas County delegation to the Texas House of Representatives and that these two were the only two Negroes ever slated by the Dallas Committee for Responsible Government (DCRG), a white-dominated organization that is in effective control of Democratic Party

[10] There is no requirement that candidates reside in subdistricts of the multimember district. Thus, all candidates may be selected from outside the Negro residential area.

candidate slating in Dallas County.[11] That organization, the District Court found, did not need the support of the Negro community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community. The court found that as recently as 1970 the DCRG was relying upon "racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community." *Id.*, at 727. Based on the evidence before it, the District Court concluded that "the black community has been effectively excluded from participation in the Democratic primary selection process," *id.*, at 726, and was therefore generally not permitted to enter into the political process in a reliable and meaningful manner. These findings and conclusions are sufficient to sustain the District Court's judgment with respect to the Dallas multimember district and, on this record, we have no reason to disturb them.

IV

The same is true of the order requiring disestablishment of the multimember district in Bexar County. Consistently with *Hernandez* v. *Texas*, 347 U. S. 475 (1954), the District Court considered the Mexican-Americans in Bexar County to be an identifiable class for Fourteenth Amendment purposes and proceeded to inquire whether the impact of the multimember district on this group constituted invidious discrimination. Surveying the historic and present condition of the Bexar County Mexican-American community, which is concen-

[11] The District Court found that "it is extremely difficult to secure either a representative seat in the Dallas County delegation or the Democratic primary nomination without the endorsement of the Dallas Committee for Responsible Government." 343 F. Supp., at 726.

trated for the most part on the west side of the city of San Antonio, the court observed, based upon prior cases and the record before it, that the Bexar community, along with other Mexican-Americans in Texas,[12] had long "suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others." 343 F. Supp., at 728. The bulk of the Mexican-American community in Bexar County occupied the Barrio, an area consisting of about 28 contiguous census tracts in the city of San Antonio. Over 78% of Barrio residents were Mexican-Americans, making up 29% of the county's total population. The Barrio is an area of poor housing; its residents have low income and a high rate of unemployment. The typical Mexican-American suffers a cultural and language barrier[13] that makes his participation in community processes extremely difficult, particularly, the court thought, with respect to the political life of Bexar County. "[A] cultural incompatability . . . conjoined with the poll tax and the most restrictive voter registration procedures in the nation have operated to effectively deny Mexican-Americans access to the political processes in Texas even longer than the Blacks were formally denied access by the white primary." 343 F. Supp., at 731. The residual impact of this history reflected itself in the fact that Mexican-American voting registration remained very poor in the county and that only five Mexican-Americans since 1880 have served in the Texas Legislature from

[12] Mexican-Americans constituted approximately 20% of the population of the State of Texas.

[13] The District Court found that "[t]he fact that [Mexican-Americans] are reared in a sub-culture in which a dialect of Spanish is the primary language provides permanent impediments to their educational and vocational advancement and creates other traumatic problems." 343 F. Supp., at 730.

Bexar County. Of these, only two were from the Barrio area.[14] The District Court also concluded from the evidence that the Bexar County legislative delegation in the House was insufficiently responsive to Mexican-American interests.

Based on the totality of the circumstances, the District Court evolved its ultimate assessment of the multimember district, overlaid, as it was, on the cultural and economic realities of the Mexican-American community in Bexar County and its relationship with the rest of the county. Its judgment was that Bexar County Mexican-Americans "are effectively removed from the political processes of Bexar [County] in violation of all the *Whitcomb* standards, whatever their absolute numbers may total in that County." *Id.*, at 733. Single-member districts were thought required to remedy "the effects of past and present discrimination against Mexican-Americans," *ibid.*, and to bring the community into the full stream of political life of the county and State by encouraging their further registration, voting, and other political activities.

The District Court apparently paid due heed to *Whitcomb* v. *Chavis, supra,* did not hold that every racial or political group has a constitutional right to be represented in the state legislature, but did, from its own special vantage point, conclude that the multimember district, as designed and operated in Bexar County, invidiously excluded Mexican-Americans from effective participation in political life, specifically in the election of representatives to the Texas House of Representatives. On the record before us, we are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of

[14] Two other residents of the Barrio, a Negro and an Anglo-American, have also served in the Texas Legislature.

the Bexar County multimember district in the light of past and present reality, political and otherwise.

Affirmed in part, reversed in part, and remanded.

APPENDIX TO OPINION OF THE COURT

The Redistricting Board's plan embodied the following districts:

District	Population	Average Multi-member	(Under) Over	Percent Deviation Over (Under)
1	76,285		1,640	2.2
2	77,102		2,457	3.3
3	78,943		4,298	5.8
4	71,928		(2,717)	(3.6)
5	75,014		369	.5
6	76,051		1,406	1.9
7 (3)	221,314	73,771	(874)	(1.2)
8	74,303		(342)	(.5)
9	76,813		2,168	2.9
10	72,410		(2,235)	(3.0)
11	73,136		(1,509)	(2.0)
12	74,704		59	.1
13	75,929		1,284	1.7
14	76,597		1,952	2.6
15	76,701		2,056	2.8
16	74,218		(427)	(.6)
17	72,941		(1,704)	(2.3)
18	77,159		2,514	3.4
19 (2)	150,209	75,104	459	.6
20	75,592		947	1.3
21	74,651		6	.0
22	73,311		(1,334)	(1.8)
23	75,777		1,132	1.5
24	73,966		(679)	(.9)
25	75,633		988	1.3
26 (18)	1,327,321	73,740	(905)	(1.2)
27	77,788		3,143	4.2
28	72,367		(2,278)	(3.1)
29	76,505		1,860	2.5
30	77,008		2,363	3.2
31	75,025		380	.5
32 (9)	675,499	75,055	410	.5
33	73,071		(1,574)	(2.1)
34	76,071		1,426	1.9
35 (2)	147,553	73,777	(868)	(1.2)
36	74,633		(12)	(.0)
37 (4)	295,516	73,879	(766)	(1.0)

APPENDIX—*Continued*

District	Population	Average Multi-member	(Under) Over	Percent Deviation Over (Under)
38	78,897		4,252	5.7
39	77,363		2,718	3.6
40	71,597		(3,048)	(4.1)
41	73,678		(967)	(1.3)
42	74,706		61	.1
43	74,160		(485)	(.6)
44	75,278		633	.8
45	78,090		3,445	4.6
46 (11)	826,698	75,154	509	.7
47	76,319		1,674	2.2
48 (3)	220,056	73,352	(1,293)	(1.7)
49	76,254		1,609	2.2
50	74,268		(377)	(.5)
51	75,800		1,155	1.5
52	76,601		1,956	2.6
53	74,499		(146)	(.2)
54	77,505		2,860	3.8
55	76,947		2,302	3.1
56	74,070		(575)	(.8)
57	77,211		2,566	3.4
58	75,120		475	.6
59 (2)	144,995	72,497	(2,148)	(2.9)
60	75,054		409	.5
61	73,356		(1,289)	(1.7)
62	72,240		(2,405)	(3.2)
63	75,191		546	.7
64	74,546		(99)	(.1)
65	75,720		1,075	1.4
66	72,310		(2,335)	(3.1)
67	75,034		389	.5
68	74,524		(121)	(.2)
69	74,765		120	.2
70	77,827		3,182	4.3
71	73,711		(934)	(1.3)
72 (4)	297,770	74,442	(203)	(.3)
73	74,309		(336)	(.5)
74	73,743		(902)	(1.2)
75 (2)	147,722	73,861	(784)	(1.1)
76	76,083		1,438	1.9
77	77,704		3,059	4.1
78	71,900		(2,745)	(3.7)
79	75,164		519	.7
80	75,111		466	.6
81	75,674		1,029	1.4
82	76,006		1,361	1.8

APPENDIX—*Continued*

District	Population	Average Multi-member	(Under) Over	Percent Deviation Over (Under)
83	75,752		1,107	1.5
84	75,634		989	1.3
85	71,564		(3,081)	(4.1)
86	73,157		(1,488)	(2.0)
87	73,045		(1,600)	(2.1)
88	75,076		431	.6
89	74,206		(439)	(.6)
90	74,377		(268)	(.4)
91	73,381		(1,264)	(1.7)
92	71,908		(2,737)	(3.7)
93	72,761		(1,884)	(2.5)
94	73,328		(1,317)	(1.8)
95	73,825		(820)	(1.1)
96	72,505		(2,140)	(2.9)
97	74,202		(443)	(.6)
98	72,380		(2,265)	(3.0)
99	74,123		(522)	(.7)
100	75,682		1,037	1.4
101	75,204		559	.7

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting in No. 71–1476, *ante*, p. 735, and concurring in part and dissenting in part in No. 72–147.

The Court today upholds statewide legislative apportionment plans for Connecticut and Texas, even though these plans admittedly entail substantial inequalities in the population of the representative districts, and even though the States have made virtually no attempt to justify their failure "to construct districts . . . as nearly of equal population as is practicable." *Reynolds* v. *Sims*, 377 U. S. 533, 577 (1964). In reaching this conclusion, the Court sets aside the judgment of the United States District Court for the District of Connecticut holding the Connecticut plan invalid, and the judgment of the United States District Court for the Western Dis-

trict of Texas reaching a similar result as to the Texas plan. In the Texas case, the Court does affirm, however, the District Court's determination that the use of multimember districts in Dallas and Bexar Counties had the unconstitutional effect of minimizing the voting strength of racial groups.[1] See *Whitcomb* v. *Chavis*, 403 U. S. 124, 142–144 (1971); *Burns* v. *Richardson*, 384 U. S. 73, 88 (1966); *Fortson* v. *Dorsey*, 379 U. S. 433, 439 (1965). With that latter conclusion I am in full agreement, as I also agree with and join Part I of the Court's opinion in No. 72–147, *White* v. *Regester*. But the decision to uphold the state apportionment schemes reflects a substantial and very unfortunate retreat from the principles established in our earlier cases, and I therefore must state my dissenting views.

I

At issue in No. 71–1476, *Gaffney* v. *Cummings*, is the 1971 reapportionment plan for election of members of the House of Representatives of Connecticut. The plan was premised on a 151-member House, with each member elected from a single-member district. Since the population of the State was 3,032,217, according to 1970 census data, the ideal would fix the population of each district at 20,081. In fact, the population of many

[1] In *Fortson* v. *Dorsey*, 379 U. S. 433 (1965), we held that a multimember district is not *per se* unconstitutional under the Equal Protection Clause, even though we had previously recognized certain inherently undesirable features of the device. See *Lucas* v. *Colorado General Assembly*, 377 U. S. 713, 731 n. 21 (1964). We have concluded, however, that the use of the device is, in fact, unconstitutional, where it operates to "'minimize or cancel out the voting strength of racial or political elements of the voting population,'" *Burns* v. *Richardson*, 384 U. S. 73, 88 (1966), quoting from *Fortson* v. *Dorsey*, *supra*, at 439. Today's decision is the first in which we have sustained an attack on the use of multimember districts. Cf. *Whitcomb* v. *Chavis*, 403 U. S. 124, 144 (1971).

districts deviated substantially from the ideal, ranging from a district underrepresented by 3.93% to one overrepresented by 3.9%. The total spread of deviation—a figure deemed relevant in each of our earlier decisions—was 7.83%. The population of 39 assembly districts deviated from the average by more than 3%. Another 34 districts deviated by more than 2%. The average deviation was just under 2%. To demonstrate that the state plan did not achieve the greatest practicable degree of equality in per-district population, appellees submitted a number of proposed apportionment plans, including one that would have significantly reduced the extent of inequality. The total range of deviation under appellees' plan would have been 2.61%, as compared to 7.83% under the state plan.

The District Court held the state plan invalid on the ground that "the deviations from equality of populations of the . . . House districts are not justified by any sufficient state interest." [2] 341 F. Supp. 139, 148 (Conn. 1972). Instead of adopting one of appellees' plans, the court appointed a Special Master to chart a new plan, and his effort produced a scheme with a total range of deviation of only 1.16%. In overturning the District Court's decision, the Court does not conclude, as it did earlier this Term in *Mahan* v. *Howell*, 410 U. S. 315 (1973), that the District Court failed to discern the State's sufficient justification for the deviations. Indeed, in view of appellant's halfhearted attempts to justify

[2] With regard to the senatorial districts, the 1971 plan produced a total variance of 1.81%. Although appellees did not specifically challenge the apportionment of senatorial districts, the District Court properly concluded that its finding of unconstitutional deviation in one house required invalidation of the entire apportionment plan. *Maryland Committee for Fair Representation* v. *Tawes*, 377 U. S. 656, 673 (1964); *Lucas* v. *Colorado General Assembly*, *supra*, at 735. *Burns* v. *Richardson*, *supra*, at 83.

the deviations at issue here, such a conclusion could hardly be supported. Whereas the Commonwealth of Virginia made a substantial effort to draw district lines in conformity with the boundaries of political subdivisions—an effort that was found sufficient in *Mahan* v. *Howell* to validate a plan with total deviation of 16.4%—the evidence in the case before us requires the conclusion that Connecticut's apportionment plan was drawn in complete disregard of political subdivision lines. The District Court pointed out that "[t]he boundary lines of 47 towns are cut under the Plan so that one or more portions of each of these 47 towns are added to another town or a portion of another town to form an assembly district." 341 F. Supp., at 142. Moreover, the boundary lines of 29 of these 47 towns were cut more than once, and the plan created "78 segments of towns in the formation of 151 assembly districts." *Ibid.*

Although appellant failed to offer cogent reasons in explanation of the substantial variations in district population, the Court nevertheless upholds the state plan. The Court reasons that even in the absence of any explanation for the failure to achieve equality, the showing of a total deviation of almost 8% does not make out a prima facie case of invidious discrimination under the Fourteenth Amendment. Deviations no greater than 8% are, in other words, to be deemed *de minimis*, and the State need not offer any justification at all for the failure to approximate more closely the ideal of *Reynolds* v. *Sims*, *supra*.

The Texas reapportionment case, No. 72–147, *White* v. *Regester*, presents a similar situation, except that the range of deviation in district population is greater and the State's justifications are, if anything, more meager. An ideal district in Texas, which chooses the 150 members of the State House of Representatives from 79 single-member and 11 multimember districts, is 74,645. As

defined in the State's 1970 plan, a substantial number of districts departed significantly from the ideal. The total range of deviation was at least 9.9%, and arguably almost 30%, depending on the mode of calculation.[3] The District Court pointed out that

> "[i]n all of the evidence presented in this case, the State has not attempted to explain in terms of rational State policy its failure to create districts equal in population as nearly as practicable, nor has the State sought to justify a single deviation from precise mathematical equality. The lengthy depositions of the members of the legislative redistricting board and of the staff members who did the actual drawing of the legislative district lines are devoid of any meaningful indications of the standards used." 343 F. Supp. 704, 714 (WD Tex. 1972).

As the District Court's opinion makes clear, the variations surely cannot be defended as a necessary byproduct of a state effort to avoid fragmentation of political subdivisions. Nevertheless, the Court today sets aside the District Court's decision, reasoning, as in the Connecticut case, that a showing of as much as 9.9% total deviation still does not establish a prima facie case under the Equal Protection Clause of the Fourteenth Amendment. Since the Court expresses no misgivings about our recent decision in *Abate* v. *Mundt*, 403 U. S. 182 (1971), where we held that a total deviation of 11.9% must be

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[3] The District Court pointed out that "the State's method of computing deviations in the multi-member districts may distort the actual percentage deviations in those eleven districts. . . . Since we have concluded that the 9.9% total deviation is not the result of a good faith attempt to achieve population equality as nearly as practicable, it is unnecessary for us to resolve this complex computational conflict." 343 F. Supp. 704, 713 n. 5. A similar conflict existed in *Mahan* v. *Howell*, 410 U. S. 315 (1973), as I pointed out in my dissenting opinion, *id.*, at 333, and there too the Court declined to indicate any awareness of the dispute.

justified by the State, one can reasonably surmise that a line has been drawn at 10%—deviations in excess of that amount are apparently acceptable only on a showing of justification by the State; deviations less than that amount require no justification whatsoever.

II

The proposition that certain deviations from equality of district population are so small as to lack constitutional significance, while repeatedly urged on this Court by States that failed to achieve precise equality, has never before commanded a majority of the Court.[4] Indeed, in *Kirkpatrick* v. *Preisler*, 394 U. S. 526, 530 (1969), we expressly rejected the argument

> "that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the 'as nearly as practicable' standard. The whole thrust of the 'as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case."

The Court reasons, however, that *Kirkpatrick* v. *Preisler*,

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[4] There is a statement, to be sure, in *Swann* v. *Adams*, 385 U. S. 440, 444 (1967), that "[*d*]*e minimis* deviations are unavoidable," but that statement must be viewed in context. By way of clarification, the Court immediately added that "the *Reynolds* opinion limited the allowable deviations to those minor variations which 'are based on legitimate considerations incident to the effectuation of a rational state policy.' 377 U. S. 533, 579." *Ibid.* Similarly, the Court noted, quoting from *Roman* v. *Sincock*, 377 U. S. 695, 710 (1964), that "the Constitution permits 'such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.'" 385 U. S., at 444. *Swann* v. *Adams* does not, in my view, suggest any support for the proposition that deviations as great as 10% are tolerable in the absence of any justification or explanation by the State.

supra, a case that concerned the division of Missouri into congressional districts, has no application to the apportionment of seats in a state legislature. In my dissenting opinion in *Mahan* v. *Howell*, *supra*, I pointed out that the language, reasoning, and background of the *Kirkpatrick* decision all command the conclusion that our holding there is applicable to state legislative apportionment no less than to congressional districting. In fact, this Court specifically recognized as much in the context of a challenge to an Arizona apportionment scheme in *Ely* v. *Klahr*, 403 U. S. 108 (1971). Describing the opinion of the District Court whose judgment was under review, we noted that the court below had "properly concluded that this plan was invalid under *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969), and *Wells* v. *Rockefeller*, 394 U. S. 542 (1969), since the legislature had operated on the notion that a 16% deviation was *de minimis* and consequently made no effort to achieve greater equality." 403 U. S., at 111. Yet it is precisely such a notion that the Court today approves.[5]

Moreover, even if *Kirkpatrick* should be deemed inapplicable to the apportionment of state legislative districts, the reasoning that gave rise to our rejection of a

[5] By contrast, in *Mahan* v. *Howell*, *supra*, the Court expressly reaffirmed the holding of *Reynolds* v. *Sims*, 377 U. S. 533 (1964), that "some deviations from the equal-population principle are constitutionally permissible" "[*s*]*o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy.*" *Id.*, at 579, quoted in *Mahan* v. *Howell*, *supra*, at 325 (emphasis added). In my view, the Court incorrectly concluded in *Mahan* v. *Howell* that Virginia had justified the population variations at issue there. Nevertheless, the Court did follow the line of analysis prescribed in our earlier decisions—requiring the State to justify every deviation from precise equality. The approach of *Mahan* is, therefore, directly at odds with the approach adopted today. See also, *e. g.*, *Abate* v. *Mundt*, 403 U. S. 182, 185 (1971); *Kilgarlin* v. *Hill*, 386 U. S. 120, 122 (1967); *Swann* v. *Adams*, *supra*, at 443–446.

de minimis approach is fully applicable to the case before us. We pointed out there that the "as nearly as practicable" standard—the standard that controls legislative apportionment as well as congressional districting, *Reynolds* v. *Sims, supra,* at 577—demands that "the State make a good-faith effort to achieve precise mathematical equality. . . . Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from these purposes." 394 U. S., at 530–531. *Kirkpatrick* recognized that "to consider a certain range of variances *de minimis* would encourage legislators to strive for that range rather than for equality as nearly as practicable." 394 U. S., at 531.

Although not purporting to quarrel with the principle that precise mathematical equality is the constitutionally mandated goal of reapportionment, the Court today establishes a wide margin of tolerable error, and thereby undermines the effort to effectuate the principle. For it is clear that the state legislatures and the state and federal courts have viewed *Kirkpatrick* as controlling on the issue of legislative apportionment, and the outgrowth of that assumption has been a truly extraordinary record of compliance with the constitutional mandate. Appellees in No. 71–1476 make the point forcefully by comparing the extent of inequality in the population of legislative districts prior to 1969, the year of our decision in *Kirkpatrick,* with the extent of inequality in subsequent years.[6] Prior to 1969, the range of variances in population of state senatorial districts exceeded 15% in 44 of the 50 States. Three States had

[6] Appellees' figures are compiled from a table entitled Apportionment of Legislatures, in 17 Council of State Governments, the Book of the States: 1968–1969, pp. 66–67 (1968), and from Council of State Governments, Reapportionment in the Seventies (1973).

reduced the total variance to between 10% and 15%; two had cut the variance to between 5% and 10%; only one had reduced the variance below 5%. The record of apportionment of state House districts was even less encouraging. Variances in excess of 15% characterized all but two of the States, and only one of these had brought the total variance under 10%. The improvement in the post-1969 years could not have been more dramatic. The table provided by appellees, set out in full in the margin,[7] reveals that in almost one-half of the States the total variance in population of senatorial districts was within 5% to zero. Of the 45 States as to which information was available, 32 had reduced the total variance below 10% and only eight had failed to bring the total variance below 15%. With regard to House districts the improvement is similar. On the basis of information concerning 42 States, it appears that 20 had achieved a total variance of less than 5%, and only 14 retained districts with a total variance of more than 15% from the constitutional ideal.

To appreciate the significance of this encouraging development, it is important to understand that the demand for precise mathematical equality rests neither on

[7] Deviations After 1970

Range of Deviations	Number of States	Percentage of States
	Senate:	
Under 1%	3	6.7%
1–5%	21	46.7%
5–10%	8	17.8%
10–15%	5	11.1%
Over 15%	8	17.8%
	House:	
Under 1%	4	9.5%
1–5%	16	38.1%
5–10%	8	19.1%
10–15%	4	9.5%
Over 15%	10	23.8%

a scholastic obsession with abstract numbers nor a rigid insensitivity to the political realities of the reapportionment process. Our paramount concern has remained an individual and personal right—the right to an equal vote. "While the result of a court decision in a state legislative apportionment controversy may be to require the restructuring of the geographical distribution of seats in a state legislature, the judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote." *Reynolds* v. *Sims, supra,* at 561. We have demanded equality in district population precisely to insure that the weight of a person's vote will not depend on the district in which he lives. The conclusion that a State may, without any articulated justification, deliberately weight some persons' votes more heavily than others, seems to me fundamentally at odds with the purpose and rationale of our reapportionment decisions. Regrettably, today's decisions are likely to jeopardize the very substantial gains that have been made during the last four years.

Moreover, if any approach ascribes too much importance to abstract numbers and too little to the realities of malapportionment, it is not *Kirkpatrick*'s demand for precise equality in district population, but rather the Court's own *de minimis* approach. By establishing an arbitrary cutoff point expressed in terms of total percentage variance from the constitutional ideal, the Court fails to recognize that percentage figures tend to hide the total number of persons affected by unequal weighting of votes. In the Texas case, for example, the District Court pointed out that

> "the total deviations for Dallas and Bexar Counties, respectively, amount to about 16,000 people and 5,500 people, for a total of around 21,500 people.

> The percentage deviation figures are only a shorthand method of expressing the 'loss,' dilution, or disproportionate weighting of votes. Just as the Court in *Reynolds* concluded that legislators represent people, not trees or cows, so we would emphasize that legislators represent people, not percentages of people." 343 F. Supp., at 713 n. 5.

Finally, it is no answer to suggest that precise mathematical equality is an unsatisfactory goal in view of the inevitable inaccuracies of the census data on which the plans are based. That argument, which we implicitly rejected in *Kirkpatrick* v. *Preisler, supra,*[8] mixes two distinct questions. In the first place, a state apportionment plan must be grounded on the most accurate available data, and the unreliability of the data may itself necessitate the invalidation of the plan. But once the data are established, the State's constitutional obligation is to achieve the highest practicable degree of equality with reference to the information at hand. In my view, the District Courts properly concluded that neither Texas nor Connecticut had satisfied this obligation. I would therefore affirm both judgments.

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[8] See 394 U. S., at 538–540 (1969) (Fortas, J., concurring); *Wells* v. *Rockefeller,* 394 U. S. 542, 554 (1969) (WHITE, J., dissenting).

Syllabus

WHITE, SECRETARY OF STATE OF TEXAS *v.* WEISER ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

No. 71–1623. Argued February 26, 1973—Decided June 18, 1973

Texas enacted Senate Bill One (S. B. 1) providing for congressional redistricting. The State was divided into 24 districts, with an average deviation from the ideal district of .745%, and a maximum deviation of 2.43% above and 1.7% below the ideal. Appellees alleged that the reapportionment violated their constitutional rights under Art. I, § 2, and submitted Plan B, which, although cutting across more county lines, generally followed the district lines of S. B. 1. Plan B had a total maximum deviation of .149%. Shortly before the three-judge court hearing, appellees submitted, alternatively, Plan C. That scheme, with a total maximum deviation of .284%, substantially disregarded the configuration of the districts in S. B. 1, using population as the only consideration. The District Court found S. B. 1 unconstitutional and ordered the adoption of Plan C, as being more compact and contiguous than the other plans. *Held:*

1. Although the percentage deviations in S. B. 1 are smaller than those invalidated in *Kirkpatrick* v. *Preisler*, 394 U. S. 526, and *Wells* v. *Rockefeller*, 394 U. S. 542, they were not "unavoidable" and the districts were not as mathematically equal as reasonably possible. The argument that variances are justified if they necessarily result from the State's attempt to avoid fragmenting political subdivisions by drawing district lines along existing political subdivision lines is not legally acceptable. *Kirkpatrick*, *supra*, at 533–534. Pp. 790–791.

2. Though the drawing of district boundaries in a way that minimizes the number of contests between present incumbents does not of itself establish invidiousness, *Burns* v. *Richardson*, 384 U. S. 73, 89 n. 16, it is not necessary to decide whether such state interest will justify the deviations in S. B. 1, since Plan B serves this purpose as well with less population variance. Pp. 791–792.

3. Population variances do invidiously devalue the individual's vote at some point or level in size, and this is especially noticeable in congressional districts with their substantial populations. Pp. 792–793.

4. Plan B, to a greater extent than Plan C, while eliminating population variances, adhered to the districting preferences of the state legislature, which has "primary jurisdiction" over legislative reapportionment. Pp. 793–797.

Affirmed in part, reversed in part, and remanded.

WHITE, J., delivered the opinion of the Court, in Part I of which all Members joined and in Part II of which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. POWELL, J., filed a concurring opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 798. MARSHALL, J., filed an opinion concurring in part in Part II of the opinion of the Court, *post*, p. 798.

Charles L. Black, Jr., argued the cause for appellant. With him on the briefs were *Crawford C. Martin*, former Attorney General of Texas, *John L. Hill*, Attorney General, *John M. Barron*, First Assistant Attorney General, and *Samuel D. McDaniel*.

Lawrence Fischman argued the cause for appellees. With him on the brief was *David H. Rosenberg*. *J. Douglas McGuire* filed a brief for appellees Van Henry Archer, Jr., et al.

MR. JUSTICE WHITE delivered the opinion of the Court.

This case concerns the congressional reapportionment of the State of Texas.

On June 17, 1971, the Governor of the State of Texas signed into law Senate Bill One (S. B. 1), Tex. Acts, 62d Leg., 1st Called Sess., c. 12, p. 38, providing for the congressional redistricting of the State. S. B. 1 divided the State into 24 congressional districts for the ensuing decennium.[1] Based upon 1970 census figures, absolute

[1] Prior to the passage of S. B. 1, the Texas Senate had twice defeated redistricting bills, passed by the House, with total deviations smaller than the total deviation in S. B. 1.

population equality among the 24 districts would mean a population of 466,530 in each district. The districts created by S. B. 1 varied from a high of 477,856 in the 13th District to a low of 458,581 in the 15th District. The 13th District exceeded the ideal district by 2.43% and the 15th District was smaller by 1.7%. The population difference between the two districts was 19,275 persons, and their total percentage deviation was 4.13%. The ratio of the 13th District to the 15th was 1.04 to 1. The average deviation of all districts from the ideal district of 466,530 was .745% or 3,421 persons.[2]

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[2] The redistricting of the 24 Texas congressional districts under S. B. 1 follows:

District	Population	Absolute Variance from Ideal	% Variance from Ideal
1	461,870	− 4,651	1.00
2	466,836	+ 306	.07
3	465,221	− 1,309	.28
4	463,142	− 3,388	.73
5	465,093	− 1,437	.31
6	467,913	+ 1,383	.30
7	461,704	− 4,826	1.03
8	461,216	− 5,314	1.14
9	467,483	+ 953	.20
10	465,493	− 1,037	.22
11	468,148	+ 1,618	.35
12	465,671	− 859	.18
13	477,856	+11,326	2.43
14	467,839	+ 1,309	.28
15	458,581	− 7,949	1.70
16	477,614	+11,084	2.38
17	467,912	+ 1,382	.30
18	462,062	− 4,468	.96
19	477,459	+10,929	2.34
20	467,942	+ 1,412	.30
21	466,656	+ 126	.03
22	461,448	− 5,082	1.09
23	466,248	− 282	.06
24	465,315	− 1,216	.26

On October 19, 1971, appellees, residents of the 6th, 13th, 16th, and 19th congressional districts, filed suit in the United States District Court for the Northern District of Texas against appellant, the Secretary of State of Texas and the chief election officer of the State. Appellees alleged that the reapportionment of the Texas congressional seats as embodied in S. B. 1 violated their rights under Art. I, § 2, and the Equal Protection Clause of the Fourteenth Amendment.[3] They requested an injunction against the use of S. B. 1, an order requiring a new apportionment or the use of a plan submitted with their complaint, or at-large elections. The plan appended to appellees' original complaint, which came to be called Plan B, generally followed the redistricting pattern of S. B. 1. However, the district lines were adjusted where necessary so as to achieve smaller population variances among districts. Plan B created districts varying from 466,930 to 466,234, for a total absolute deviation between the largest and smallest district of 696 persons. District 12 exceeded the ideal by .086% and District Four was under the ideal by .063%, for a total percentage deviation of .149%. Although the plan followed the district lines of S. B. 1 where possible, in order to achieve maximum population equality, Plan B cut across 18 more county lines than did S. B. 1.[4]

[3] At a subsequent pretrial conference, the Fourteenth Amendment claims were eliminated.

[4] Plan B resulted in the following districting:

District	Population	Absolute Variance from Ideal
1	466,545	+ 15
2	466,565	+ 35
3	466,266	−264
4	466,234	−296
5	466,620	+ 90

[*Footnote 4 continued on p. 787*]

A three-judge court was convened. 28 U. S. C. §§ 2281, 2284. On January 10, 1972, several days prior to the scheduled hearing of the case, appellees filed an amended complaint suggesting an alternative plan, which came to be called Plan C. Plan C, unlike Plan B, substantially disregarded the configuration of the districts in S. B. 1. Instead, as the authors of the plan frankly admitted and the District Court found, Plan C represented an attempt to attain lower deviations without regard to any consideration other than population. The districts in Plan C varied in population from 467,173 as a high to 465,855 as a low, a difference of 1,318 persons. The largest district was overpopulated by .139%, and the smallest underpopulated by .145%, the total percentage deviation being .284%. Plan C had 14 districts with greater deviations than Plan B, eight districts with deviations

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District	Population	Absolute Variance from Ideal
6	466,285	−245
7	466,336	−194
8	466,704	+174
9	466,678	+148
10	466,313	−217
11	466,258	−272
12	466,930	+400
13	466,663	+133
14	466,437	− 93
15	466,359	−171
16	466,663	+133
17	466,432	− 98
18	466,520	− 10
19	466,649	+119
20	466,514	− 16
21	466,753	+223
22	466,707	+177
23	466,424	−106
24	466,875	+345

equal to those found in Plan B, and two districts with deviations smaller than those in Plan B.[5]

On January 21, 1972, the District Court heard argument and received into evidence various depositions. The next day, the court announced its decision. Relying upon this Court's decision in *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969), the District Court declared S. B. 1 unconstitutional and enjoined appellant from "conducting or permitting any primary or general elections based upon the districts established by S. B. 1." The District Court ordered the adoption of Plan C as "the plan of this Court for the congressional districts of the State

[5] Plan C resulted in the following districts:

District	Population	Absolute Variance from Ideal
1	465,986	−544
2	466,817	+287
3	466,835	+305
4	467,108	+578
5	466,258	−272
6	467,023	+493
7	466,336	−194
8	466,704	+174
9	466,678	+148
10	466,303	−227
11	466,569	+ 39
12	466,926	+396
13	467,173	+648
14	466,437	− 93
15	466,359	−171
16	465,941	−589
17	466,340	−190
18	466,520	− 10
19	466,154	−376
20	466,654	+124
21	466,875	+345
22	466,707	+177
23	466,167	−363
24	465,855	−675

of Texas." [6] Noting that its order was entered "without prejudice to the legislative and executive branches of the State of Texas to proceed with the consideration and adoption of any other constitutionally permissible plan of congressional redistricting at a called or regular session of the Legislature," the District Court retained jurisdiction "for the purposes of considering any such plan which might be adopted by the Legislature of the State of Texas until congressional reapportionment is enacted based on the Twentieth Decennial Census to be conducted in 1980." [7]

This Court, on application of appellant, granted a stay of the order of the District Court. 404 U. S. 1065 (1972). The 1972 congressional elections were therefore conducted under the plan embodied in S. B. 1. We noted probable jurisdiction of the appeal. 409 U. S. 947 (1972).

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[6] The District Court's entire discussion of its reasons for selecting Plan C follows:

"Defendant has not submitted any plan of reapportionment as an alternative to S. B. 1. Plaintiffs have proposed two plans, B and C. Plan B is based on S. B. 1, but has a significantly lower deviation than S. B. 1. Plan C is based solely on population and is significantly more compact and contiguous than either S. B. 1 or Plan B. . . . The Court has considered Plans B and C, as well as the plan submitted by the intervening plaintiffs, and concludes that Plan C best effectuates the principle of 'one man, one vote' enunciated by the Supreme Court."

[7] The District Court's order also granted leave to intervene to Van Henry Archer, Chairman of the Bexar County Republican Party, and others. The intervenors, appellees in this Court, filed a suggested reapportionment plan with their complaint-in-intervention which was rejected by the District Court and is not pressed here. The District Court also retained jurisdiction for the purpose of extending the impending February 7, 1972, filing date for congressional candidates "in the event it is made known to [the District] Court that a called session of the Legislature will include congressional reapportionment." However, the Governor refused to call a special session of the legislature.

I

The command of Art. I, § 2, that representatives be chosen "by the People of the several States" was elucidated in *Wesberry* v. *Sanders*, 376 U. S. 1 (1964), and in *Kirkpatrick* v. *Preisler*, 394 U. S., at 527–528, to permit only those population variances among congressional districts that "are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *Id.*, at 531.[8] See also *Wells* v. *Rockefeller*, 394 U. S. 542, 546 (1969). *Kirkpatrick* and *Wells* invalidated state reapportionment statutes providing for federal congressional districts having total percentage deviations of 5.97% and 13.1%, respectively. In both cases, we concluded that the deviations did not demonstrate a good-faith effort to achieve absolute equality and were not sufficiently justified.

The percentage deviations now before us in S. B. 1 are smaller than those invalidated in *Kirkpatrick* and *Wells*, but we agree with the District Court that, under the standards of those cases, they were not "unavoidable," and the districts were not as mathematically equal as reasonably possible. Both Plans B and C demonstrate this much, and the State does not really dispute it.[9]

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[8] *Kirkpatrick* v. *Preisler* "reject[ed] Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the 'as nearly as practicable' standard." 394 U. S., at 530. We concluded, "Unless population variances among congressional districts are shown to have resulted despite such [good-faith] effort, the State must justify each variance, no matter how small." *Id.*, at 531.

[9] Prior to the passage of S. B. 1, the Texas House twice passed a congressional reapportionment bill with lower deviations. Each bill had a total deviation of 2.5%. Although both bills were ultimately defeated in the Senate, their passage by the House, and indeed their very existence, indicates that it was possible and practicable to construct a redistricting scheme with lower population deviations among districts than those embodied in S. B. 1.

Also, as in *Kirkpatrick* and *Wells*, "we do not find legally acceptable the argument that variances are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries." *Kirkpatrick* v. *Preisler, supra,* at 533–534.

The State asserts that the variances present in S. B. 1 nevertheless represent good-faith efforts by the State to promote "constituency-representative relations," [10] a policy frankly aimed at maintaining existing relationships between incumbent congressmen and their constituents and preserving the seniority the members of the State's delegation have achieved in the United States House of Representatives. We do not disparage this interest. We have, in the context of state reapportionment, said that the fact that "district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness." *Burns* v. *Richardson,* 384 U. S. 73, 89 n. 16 (1966). Cf. *Gaffney* v. *Cummings, ante,* at 752. But we need not decide whether this state interest is sufficient to justify the deviations at issue here, for Plan B admittedly serves this purpose as well

[10] "Appellant earnestly submits that the term 'constituency-representative relations' is the more accurate term; indeed it is very hard to see why those who are so concerned about representation should stigmatize as a mere euphemism a term which brings in both parties to the representational relationship . . . . (The assumptions seem to be that while a Congressman may like his job, no constituency can like its Congressman, or care whether he continues to represent it or not—and that no Congressman can possibly learn to know his constituency well enough to serve it better than he can serve another constituency selected for him by, it may be, a young mathematician in Dallas.) Under either name, appellant would defend this motive as entirely proper, if the burden of that defense fell upon him on the facts herein." Brief for Appellant 72.

as S. B. 1 while adhering more closely to population equality.[11] S. B. 1 and its population variations, therefore, were not necessary to achieve the asserted state goal, and the District Court was correct in rejecting it.[12]

Appellant also straightforwardly argues that *Kirkpatrick* and *Wells* should be modified so as not to require the "small" population variances among congressional districts involved in this case to be justified by the State. S. B. 1, it is urged, absent proof of invidiousness over and above the population variances among its districts, does not violate Art. I, § 2. It is clear, however, that at some point or level in size, population variances *do* import invidious devaluation of the individ-

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[11] It appears that the two plans passed by the House and defeated by the Senate may also have fostered this goal while achieving lower population variances.

[12] Appellant contends that the authors of S. B. 1, and the legislature in passing on the plan, took into account projected population shifts among the districts. Remembering that the congressional districting plan will be in effect for at least 10 years and five congressional elections, the appellant argues that the legislature might properly consider population changes in devising a redistricting plan. In *Kirkpatrick* v. *Preisler*, we recognized that "[w]here these shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them." 394 U. S., at 535. We were, however, careful to note:

"By this we mean to open no avenue for subterfuge. Findings as to population trends must be thoroughly documented and applied throughout the State in a systematic, not an *ad hoc*, manner." *Ibid.*

In the present case, we conclude that Texas' attempt to justify the deviations found in S. B. 1 falls far short of this standard. The record is barren, with the exception of scattered and vague assertions in deposition testimony, of adequate documentation of the projected population shifts and firm evidence that the alleged shifts were in fact relied upon.

There is also some suggestion that passage of S. B. 1 was preceded by a dispute as to who would fill the Second District congressional seat. The State does not urge this alleged goal as a justification for the deviations in S. B. 1, nor can we tell from this record whether S. B. 1 in fact resolved this dispute.

ual's vote and represent a failure to accord him fair and effective representation. Appellant concedes this and would locate the line differently than the Court did in *Kirkpatrick* and *Wells*. Keeping in mind that congressional districts are not so intertwined and freighted with strictly local interests as are state legislative districts and that, as compared with the latter, they are relatively enormous, with each percentage point of variation representing almost 5,000 people, we are not inclined to disturb *Kirkpatrick* and *Wells*. This is particularly so in light of *Mahan* v. *Howell*, 410 U. S. 315 (1973), decided earlier this Term, where we reiterated that the *Wesberry*, *Kirkpatrick*, and *Wells* line of cases would continue to govern congressional reapportionments, although holding that the rigor of the rule of those cases was inappropriate for state reapportionments challenged under the Equal Protection Clause of the Fourteenth Amendment.

II

The District Court properly rejected S. B. 1, but it had before it both Plan B and Plan C, and there remains the question whether the court correctly chose to implement the latter.[13] Plan B adhered to the basic district configurations found in S. B. 1, but adjusted the district lines, where necessary, in order to achieve maximum population equality among districts. Each district in Plan B contained generally the same counties as the equivalent district in S. B. 1.[14] Plan C, on the other hand, was based entirely upon population considerations

[13] The court had before it a plan submitted by the plaintiffs-intervenors and, possibly, other plans. Only Plan B and Plan C appear to have been seriously urged by the parties and considered by the court, and only those plans are defended before this Court.

[14] "Plan B, presented by Appellees, merely took the plan of the legislature and adjusted that plan to achieve greater equality to present to the court, in a graphic manner, what the legislature could

and made no attempt to adhere to the district configurations found in S. B. 1.[15] Both plans were submitted to the District Court by appellees. After deciding that S. B. 1 was unacceptable, the District Court ordered the implementation of Plan C. In announcing its decision, the court said only:

> "Plan C is based solely on population and is significantly more compact and contiguous than either S. B. 1 or Plan B. . . . The Court has considered Plans B and C . . . and concludes that Plan C best effectuates the principle of 'one man, one vote' enunciated by the Supreme Court."

Appellant argues that, even if the District Court properly struck down S. B. 1, it should have selected Plan B rather than Plan C. Appellees defend the selection of Plan C as an exercise of the remedial discretion of the District Court, although in doing so they argue against a plan that they proposed and frequently urged upon the District Court.

From the beginning, we have recognized that "reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites

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have done if it had been disposed to make an attempt at population equality . . . ." Brief for Appellees 25.

[15] Appellees' amended complaint explained Plan C, as follows: "That had the legislature desired to enact a statute consonant with the mandate of Article I, § 2 of the U. S. Constitution, that is a plan which made each district as compact and contiguous and as nearly equal in population to each other district as practicable, taking into account solely population and not taking into account 'social,' 'cultural,' 'economic' or 'other factors' including preservation of incumbent congressman, it could have enacted a plan the same as or substantially similar to that plan set forth in Exhibit C annexed hereto and herewith incorporated by reference as though set forth at length herein. That such plan is hereinafter referred to as 'Plan C.'"

in a timely fashion after having had an adequate opportunity to do so." *Reynolds* v. *Sims,* 377 U. S. 533, 586 (1964). See also, *id.,* at 584, 586–587; *id.,* at 588–589 (opinion of STEWART, J.). We have adhered to the view that state legislatures have "primary jurisdiction" over legislative reapportionment. See *Maryland Committee for Fair Representation* v. *Tawes,* 377 U. S. 656, 676 (1964); *Davis* v. *Mann,* 377 U. S. 678, 693 (1964); *Roman* v. *Sincock,* 377 U. S. 695, 709–710, 711–712 (1964); *Burns* v. *Richardson,* 384 U. S., at 84–85; *Ely* v. *Klahr,* 403 U. S. 108, 114 (1971); *Whitcomb* v. *Chavis,* 403 U. S. 124, 160–161 (1971); *Sixty-seventh Minnesota State Senate* v. *Beens,* 406 U. S. 187, 195–201 (1972); *Mahan* v. *Howell,* 410 U. S., at 327. Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment. In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor "intrude upon state policy any more than necessary." *Whitcomb* v. *Chavis, supra,* at 160.

Here, it is clear that Plan B, to a greater extent than did Plan C, adhered to the desires of the state legislature while attempting to achieve population equality among districts. S. B. 1, a duly enacted statute of the State of Texas, established the State's 24 congressional districts with locations and configurations found appropriate by the duly elected members of the two houses of the Texas Legislature. As we have often noted, reapportionment is a complicated process. Districting

inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task. See *Gaffney* v. *Cummings, ante,* at 753. Here those decisions were made by the legislature in pursuit of what were deemed important state interests. Its decisions should not be unnecessarily put aside in the course of fashioning relief appropriate to remedy what were held to be impermissible population variations between congressional districts.

Plan B, as all parties concede, represented an attempt to adhere to the districting preferences of the state legislature while eliminating population variances. Indeed, Plan B achieved the goal of population equality to a greater extent than did Plan C. Despite the existence of Plan B, the District Court ordered implementation of Plan C, which, as conceded by all parties, ignored legislative districting policy and constructed districts solely on the basis of population considerations. The District Court erred in this choice. Given the alternatives, the court should not have imposed Plan C, with its very different political impact, on the State. It should have implemented Plan B, which most clearly approximated the reapportionment plan of the state legislature, while satisfying constitutional requirements. The court said only that Plan C is "significantly more compact and contiguous" than Plan B. But both Plan B and Plan C feature contiguous districts, and, even if the districts in Plan C can be called more compact, the District Court's preferences do not override whatever state goals were embodied in S. B. 1 and, derivatively, in Plan B. "The remedial powers of an equity court must be adequate to the task, but they are not unlimited. Here the District Court erred in so broadly brushing aside state apportionment policy without solid constitutional or equitable grounds for doing so." *Whitcomb* v. *Chavis, supra,* at 161. If there was a good reason for adopt-

ing Plan C rather than Plan B, the District Court failed to state it.

Of course, the District Court should defer to state policy in fashioning relief only where that policy is consistent with constitutional norms and is not itself vulnerable to legal challenge. The District Court should not, in the name of state policy, refrain from providing remedies fully adequate to redress constitutional violations which have been adjudicated and must be rectified. But here, the District Court did not suggest or hold that the legislative policy of districting so as to preserve the constituencies of congressional incumbents was unconstitutional or even undesirable. We repeat what we have said in the context of state legislative reapportionment: "The fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness." *Burns* v. *Richardson*, 384 U. S., at 89 n. 16. Cf. *Gaffney* v. *Cummings*, *ante*, at 752; *Taylor* v. *McKeithen*, 407 U. S. 191 (1972). And we note that appellees themselves submitted Plan B to the District Court and defended it on the basis that it adhered to state goals, as embodied in S. B. 1, while eliminating impermissible deviations.[16]

The judgment of the District Court invalidating S. B. 1 is affirmed. The adoption of Plan C is, however, reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[16] S. B. 1 is conceded also to have sought adherence to county lines. While Plan B admittedly cuts more county lines than does Plan C, it also achieves lower deviations. Because both Plan B and Plan C were required to fracture more political boundaries than did S. B. 1, in order to achieve population equality among districts, appellant does not contend that Plan B is unacceptable because of more cutting of county lines.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring.

Had I been a member of the Court when *Kirkpatrick* v. *Preisler*, 394 U. S. 526 (1969), and *Wells* v. *Rockefeller*, 394 U. S. 542 (1969), were decided, I would not have thought that the Constitution—a vital and living charter after nearly two centuries because of the wise flexibility of its key provisions—could be read to require a rule of mathematical exactitude in legislative reapportionment. Moreover, the dissenting opinions of Justices Harlan* and WHITE and the concurring opinion of Justice Fortas in those cases demonstrated well that the exactitude required by the majority displayed a serious misunderstanding of the practicalities of the legislative and reapportioning processes. Nothing has occurred since *Kirkpatrick* and *Wells* to reflect adversely on the soundness, as I view it, of the dissenting perceptions. Indeed, the Court's recent opinions in *Mahan* v. *Howell*, 410 U. S. 315 (1973), *Gaffney* v. *Cummings*, *ante*, p. 735, and *White* v. *Regester*, *ante*, p. 755, strengthen the case against attempting to hold any reapportionment scheme—state or congressional—to slide-rule precision. These more recent cases have allowed modest variations from theoretical "exactitude" in recognition of the impracticality of applying the *Kirkpatrick* rule as well as in deference to legitimate state interests.

However all of this may be, *Kirkpatrick* is virtually indistinguishable from this case, and unless and until the Court decides to reconsider that decision, I will follow it. Accordingly, I join the Court's opinion.

MR. JUSTICE MARSHALL, concurring in part.

While I join Part I of the Court's opinion, I can agree with Part II wherein the Court reverses the District

*MR. JUSTICE STEWART joined Mr. Justice Harlan's opinion.

Court's selection of Plan C over Plan B only insofar as that determination rests upon the fact that Plan B comes closer than Plan C to achieving the goal of "precise mathematical equality," see *Kirkpatrick* v. *Preisler,* 394 U. S. 526, 530–531 (1969). See also *Wells* v. *Rockefeller,* 394 U. S. 542 (1969). Whatever the merits of the view that a legislature's reapportionment plan will not be struck down merely because "district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents," *Burns* v. *Richardson,* 384 U. S. 73, 89 n. 16 (1966), it is entirely another matter to suggest that a federal district court which has determined that a particular reapportionment plan fails to comport with the constitutional requirement of "one man, one vote" must, in drafting and adopting its own remedial plan, give consideration to the apparent desires of the controlling state political powers. In my opinion, the judicial remedial process in the reapportionment area—as in any area—should be a fastidiously neutral and objective one, free of all political considerations and guided only by the controlling constitutional principle of strict accuracy in representative apportionment. Here the District Court gave ample recognition to the legislature's "primary responsibility"* in the area of apportionment when it added that its redistricting order was "without prejudice to the legislative and executive branches of the State of Texas to proceed with the consideration and adoption of any other constitutionally permissible plan of congressional redistricting at a called or regular session of the Legislature of the State of Texas." Nevertheless, because the District Court failed to adhere strictly to the principle of mathematical precision in selecting between Plan B and Plan C, its choice of Plan C must be reversed.

*See, *e. g., Maryland Committee for Fair Representation* v. *Tawes,* 377 U. S. 656, 676 (1964); *Ely* v. *Klahr,* 403 U. S. 108, 114 (1971); *Burns* v. *Richardson,* 384 U. S. 73, 84–85 (1966).

ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* WICHITA BOARD OF TRADE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

No. 72-214. Argued February 28, 1973—Decided June 18, 1973*

The Interstate Commerce Commission (ICC), after hearings, approved imposition by appellant railroads of separate charges for inspection of grain while in transit, a service that had previously been provided under the line-haul rates. Appellees thereupon brought this action in District Court contesting the validity of the ICC order. That court found that the ICC had not adequately justified departure from its longstanding rule that such separate charges are unlawful unless the carriers can satisfy the burden that rests upon them of proving that their line-haul rates are insufficient to cover the total transportation service including the portion thereof for which separate charges are proposed. The court ordered suspension of the in-transit charges unless otherwise ordered by the court and remanded the case to the ICC. *Held:* The action of the District Court is affirmed as to the remand to the ICC and is reversed as to the injunction suspending the proposed charges. Pp. 806–826; 828–829.

352 F. Supp. 365, affirmed in part and reversed in part.

MR. JUSTICE MARSHALL, in an opinion joined by THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN, concluded that:

1. The ICC, which justified its departure from its prior cases on the ground that the many rates involved rendered the previous requirement impractical and the new charges when added to the line-haul rates would not exceed the ICC-prescribed maximum rate level, has not stated its reasons with sufficient clarity to facilitate proper judicial review of its approval of the in-transit inspection charges. Pp. 806–817.

2. Equitable considerations, including the doctrine of primary jurisdiction as applied to the facts of this case, required that the District Court refrain from expressing a view upon what it

*Together with No. 72-433, *Interstate Commerce Commission* v. *Wichita Board of Trade et al.*, also on appeal from the same court.

believed was permitted by national transportation policy before the ICC on remand could balance the conflicting interests of shippers, railroads, producers, and consumers in the proposed rate changes, cf. *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658; hence, it was improper for the District Court to enjoin implementation of the proposed new charges. Pp. 817–825.

MR. JUSTICE DOUGLAS concurred in the affirmance of the remand to the ICC.

MR. JUSTICE WHITE, joined by MR. JUSTICE BRENNAN and MR. JUSTICE REHNQUIST, concurring in the reversal of the injunction, concluded that only the ICC was granted the statutory authority to suspend new freight rates for seven months and the District Court has no power to extend that period. Pp. 828–829.

MARSHALL, J., announced the Court's judgment and delivered an opinion, in which BURGER, C. J., and STEWART and BLACKMUN, JJ., joined. DOUGLAS, J., filed an opinion concurring in the affirmance of the remand to the ICC and dissenting from the reversal of the decree authorizing the injunction, *post*, p. 826. WHITE, J., filed an opinion concurring in the reversal of the injunction and dissenting from the affirmance of the remand to the ICC, in which BRENNAN and REHNQUIST, JJ., joined, *post*, p. 828. POWELL, J., took no part in the consideration or decision of the cases.

Earl E. Pollock argued the cause for appellants in No. 72–214. With him on the briefs were *William F. Cottrell* and *Christopher A. Mills*. *Betty Jo Christian* argued the cause for appellant in No. 72–433. With her on the briefs were *Fritz R. Kahn* and *Hanford O'Hara*.

Daniel J. Sweeney argued the cause for Wichita Board of Trade et al., appellees in both cases. With him on the brief was *Harold E. Spencer*. *William A. Imhof* argued the cause for the Secretary of Agriculture. With him on the brief were *John A. Knebel*, *Harold M. Carter*, and *Kenneth H. Vail*.

Solicitor General Griswold, *Assistant Attorney General Kauper*, *Keith A. Jones*, and *Howard E. Shapiro* filed a memorandum for the United States.

MR. JUSTICE MARSHALL announced the judgment of the Court, and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN join.

We noted probable jurisdiction in these cases to resolve two important questions relating to the proper role of courts in reviewing approval by the Interstate Commerce Commission of proposed rate increases by railroads. 409 U. S. 1005 (1972). First, under what circumstances may a reviewing court find that the Commission has failed adequately to explain its apparent departure from settled Commission precedent? Because the problem of determining what policies an agency is following, as a prelude to determining whether the agency is acting in accordance with Congress' will, is a recurring one, this issue raises general problems of judicial review of agency action. The second question in these cases is a more limited one: in order to enjoin a proposed rate increase after a final order by the Interstate Commerce Commission, what sort of error must a District Court find in the proceedings of the Commission? We hold that in these cases the Commission did not explain its apparent departure from precedent in a manner sufficient to permit judicial review of its policies, but that, nevertheless, that kind of error does not justify the District Court in entering an injunction against imposition of the rates pending review of the Commission's action on remand. We therefore vacate the judgment of the District Court and remand for the entry of a proper order.[1]

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[1] We have previously stayed the judgment of the District Court on condition that appellant railroads keep accounts of the amounts received from the in-transit charges. 409 U. S. 801 (1972). We hereby direct the District Court to enter an order, consistent with this opinion, regarding the disposition of those amounts.

I

In these cases, the railroads proposed to establish a separate charge for inspection of grain while in transit.[2] In order to inspect the grain, the railroad cars loaded with it are stopped and placed on track facilities. A sample of the grain is taken, and the official grade is determined. Once the grade is known and the commercial value of the grain established, the shipper orders the car to proceed to the appropriate market. In-transit inspections have substantial advantages to shippers over inspection at the destination. If the grain were to be found to be of a different grade than expected only after arrival at the destination, sending it to another market might be quite expensive. The advantages of in-transit inspections to purchasers, instead of inspection at the source that might satisfy shippers, are less marked but are nonetheless significant. The grain might deteriorate while in transit, thus leaving the purchaser with grain of a lower quality than he expected. And the possibility of bias of the inspector is greater if the inspection is made at the source.

The Commission found that "the orderly marketing of grain under present practices requires that a substantial portion of the commodity moving in commercial

[2] Such a charge is already made for the first in-transit inspection in the eastern territory. The proposed rates would increase that charge from $7.42 to $14.33. There would be a slight increase in the currently effective charge for the second and subsequent inspections. A large majority of the number of in-transit inspections occur in the western territory, where most of this country's grain is produced and where no separate charge is now made for the first in-transit inspection. Only a few cars are stopped for more than one inspection. Thus, for convenience of exposition, we treat this litigation as involving a proposal for a separate new charge; that is the real effect of the railroads' proposal in most instances.

channels must be subjected to some form of sampling and inspection to determine grade or quality." 339 I. C. C. 364, 385 (1971).[3] However, it also found that this sampling need not take place while the grain is in transit. The practice of in-transit inspections developed when federal law required inspections for the purpose of grading. 39 Stat. 483. But the diversion of grain from railroads to motor trucks made it difficult to enforce the inspection requirements. When trucks are used, in-transit inspections are not generally made. Thus, in order to simplify the movement of grain, Congress abolished the requirement of inspections. Pub. L. 90–487, 82 Stat. 761. In addition, the convenience of sampling at the source of the grain has increased with the widening reliance on low-cost mechanical samplers installed at grain elevators. The Commission therefore concluded that in-transit inspections were not necessary for the orderly marketing of grain.

It also concluded that in-transit inspections resulted in a substantial decrease in the number of freight cars available for general use.[4] Relying on a variety of studies conducted by the railroads, the Commission found that each inspection kept a freight car out of use for roughly three days, and that the cumulative impact of the delays due to in-transit inspection was to reduce the available freight car fleet by several thousand cars.

Finally, the Commission considered whether the proposed separate charge for each in-transit inspection fairly reflected the cost to the railroad of such an inspection. Again, it relied on quite detailed studies that established

[3] The report of Division 2 of the Commission is found at 339 I. C. C. 364 (1971). The entire Commission "adopt[ed] and affirm[ed] the findings and conclusions reached" in that report. 340 I. C. C. 69, 70 (1971).

[4] For a description of the car-utilization problem, see *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U. S. 742, 745–746 (1972).

the cost of detaining a car, the cost of switching it on and off the main line, and the clerical costs of conducting inspections. The Commission concluded that the proposed charges were "not excessive in amount . . . on the basis of the convincing evidence of record showing the costs sustained by the railroads in performing the in-transit inspection service." 340 I. C. C., at 71–72.

Shippers who had objected to the proposed new charges before the Commission sought review of the Commission's order, and a statutory three-judge District Court was convened. The District Court found that these conclusions were supported by substantial evidence, and they are not challenged here. But the District Court held that the Commission had not adequately justified its failure to follow "its long established rule that it will not allow a separate charge for an accessorial service previously performed as part of the line-haul rates without substantial evidence that such an additional charge is justified measured against the overall services rendered and the overall reasonableness of the increased line-haul rate resulting therefrom." 352 F. Supp. 365, 368. The Commission, although it analyzed the cost of each in-transit inspection, had made no attempt to consider the reasonableness of continuing the existing line-haul rate, which included some charge for in-transit inspections. Instead, the Commission had attempted to distinguish this case from prior cases in which the rule was invoked, but the District Court, relying on *Secretary of Agriculture* v. *United States*, 347 U. S. 645 (1954), was "not convinced that the instant proceeding can be 'distinguished' as the Commission has indicated." 352 F. Supp., at 369.

Although the Commission must be given some leeway to re-examine and reinterpret its prior holdings, it is not sufficiently clear from its opinion that it has done so in this case. A reviewing court must be able to discern in the Commission's actions the policy it is now pur-

suing, so that it may complete the task of judicial review—in this regard, to determine whether the Commission's policies are consistent with its mandate from Congress. Since we cannot tell from the Commission's opinions what those policies are, we therefore agree with the District Court that the Commission's order finding the rates just and reasonable cannot be sustained.

II

Judicial review of decisions by the Interstate Commerce Commission in rate cases necessarily has a limited scope. Such decisions "are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power." *Manufacturers R. Co.* v. *United States,* 246 U. S. 457, 481 (1918).[5] As this Court has observed, "The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems." *Board of Trade of Kansas City* v. *United States,* 314 U. S. 534, 546 (1942).

The delegation to the Commission is not, of course, unbounded, and it is the duty of a reviewing court to determine whether the course followed by the Commission is consistent with its mandate from Congress. See *ICC* v. *Inland Waterways Corp.,* 319 U. S. 671, 691 (1943); *Burlington Truck Lines, Inc.* v. *United States,* 371 U. S. 156, 167–169 (1962). Cf. *NLRB* v. *Wyman-Gordon Co.,* 394 U. S. 759, 767 (1969) (opinion of Fortas,

[5] See also 5 U. S. C. § 706 (2).

J.). But a simple examination of the order being reviewed is frequently insufficient to reveal the policies that the Commission is pursuing. Thus, this Court has relied on the "simple but fundamental rule of administrative law," *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947), that the agency must set forth clearly the grounds on which it acted. For "[w]e must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 511 (1935). See also *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 197 (1941); *SEC* v. *Chenery Corp.*, 318 U. S. 80, 94 (1943). And we must rely on the rationale adopted by the agency if we are to guarantee the integrity of the administrative process. *Id.*, at 88. Cf. *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U. S. 438, 443–444 (1965). Only in that way may we "guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp.* v. *NLRB*, *supra*, at 194.

An agency "may articulate the basis of its order by reference to other decisions," *NLRB* v. *Metropolitan Life Ins. Co.*, *supra*, at 443 n. 6. For "[a]djudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. See H. Friendly, The Federal Administrative Agencies 36–52 (1962). They generally provide a guide to action that the agency may be expected to take in future cases. Subject to the qualified role of *stare decisis* in the administrative process, they may serve as precedents." *NLRB* v. *Wyman-Gordon Co.*, *supra*, at 765–766 (opinion of Fortas, J.). This is essentially a corollary of the general rule requiring that the agency explain the policies underlying its action. A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress.

There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to. From this presumption flows the agency's duty to explain its departure from prior norms. *Secretary of Agriculture* v. *United States, supra,* at 653. The agency may flatly repudiate those norms, deciding, for example, that changed circumstances mean that they are no longer required in order to effectuate congressional policy. Or it may narrow the zone in which some rule will be applied, because it appears that a more discriminating invocation of the rule will best serve congressional policy. Or it may find that, although the rule in general serves useful purposes, peculiarities of the case before it suggest that the rule not be applied in that case. Whatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate.

A further complication arises when, as here, the agency distinguishes earlier cases in which it invoked the rule. An initial step, and often the only one clearly taken, is to specify factual differences between the cases. Those factual differences serve to distinguish the cases only when some legislative policy makes the differences relevant to determining the proper scope of the prior rule. It is all too easy for a court to judge the adequacy of an asserted distinction in light of the policies the court, rather than the agency, seeks to implement; that is, after all, what an appellate court does with respect to courts of the first instance. Yet when an agency's distinction of its prior cases is found inadequate, the reviewing court may inadvertently adopt the stance it ordinarily takes with respect to other courts, and thereby may invade "the domain which Congress has set aside exclusively for the administrative agency," *SEC* v. *Chen-*

ery Corp., supra, at 196, that is, the choice of particular actions to carry out the broad policies stated by Congress. Instead, it is enough to satisfy the requirements of judicial oversight of administrative action if the agency asserts distinctions that, when fairly and sympathetically read in the context of the entire opinion of the agency, reveal the policies it is pursuing. So long as the policies can be discerned, the court may exercise its proper function of determining whether the agency's policies are consistent with congressional directives.

These principles gain content when applied to the present cases. The District Court held that the Commission had not repudiated or adequately distinguished its prior cases establishing the rule that "it will not allow a separate charge for an accessorial service previously performed as part of the line-haul rates without substantial evidence that such an additional charge is justified measured against the overall services rendered and the overall reasonableness of the increased line-haul rate resulting therefrom." 352 F. Supp., at 368. While this is a fair summary of the Commission's established practice,[6] it conceals

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[6] In *Transit Charges, Southern Territory,* 332 I. C. C. 664, 683 (1968), the Commission stated the rule in these terms: "[T]he proposed charge may not be divorced from the line-haul rate, for both, insofar as transit is concerned, are inextricably interdependent. [Citations omitted.] While it would seem preferable to have the various elements entering into, and constituting, the whole analyzed, if indeed they could be separated, the entire transportation service rendered, including transit, must be examined in relation to the total rates and charges assessed." The District Court reviewing that case rephrased the rule: "The question here is what should the carrier be paid for a service which it has been rendering, and has been charging for, and has been paid for (one knoweth not what) which it proposes to separate and charge separately for. Both the courts and the Commission have consistently held that what is a just and reasonable rate for the service to be separated and charged for separately cannot be determined by examining only the typical

the apparent purpose of the rule, to protect two distinct classes: shippers who will continue to utilize the accessorial service—in this case, those who will still have their grain inspected while in transit—and shippers who will not. To decide whether the Commission has adequately explained its failure to follow that rule, we must consider each class in turn, for the Commission may have made clear why it need not protect one class by invoking the rule but it may nonetheless have failed to say why it need not protect the other class.

In *Unloading Lumber to New York Harbor*, 256 I. C. C. 463 (1943), the Commission dealt with a proposal to charge separately for unloading, a service that was inextricably bound up with the line-haul service. Cf. *Secretary of Agriculture* v. *United States*, *supra*, at 648–649. The Commission said, "It follows that respondents may not now segregate a component of that [line-haul] service, making a separate charge therefor, without an

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questions of cost, etc., with respect to the separate service. On the contrary, the typical questions must be directed to the overall or combined picture so that one may conclude (a) that the rate for the separated service, looked at by itself in the light of the applicable questions, is just and reasonable; and (b) that the remaining rate for the services, sans the separated service, is not rendered unjust or unreasonable." *Cincinnati, N. O. & T. P. R. Co.* v. *United States*, Civil Action No. 6992 (SD Ohio, Jan. 12, 1970), aff'd, 400 U. S. 932 (1970). The District Court continued, somewhat more obscurely: "Whether the examination is in terms of 'what portion of the line-haul rate represented the rate for the service to be separated,' or whether the search in terminology is for the answer to this question: Does the new aggregate rate, composed of line-haul plus transit rates represent a just and reasonable rate for all of the services (the aggregate of the severed and the non-severed)—the principle is the same." And in *Secretary of Agriculture* v. *United States*, 347 U. S. 645, 654 (1954), this Court referred to it as "the prevailing rule . . . that a service necessarily encompassed by the line-haul rate cannot be separately restated without examining the sufficiency of the line-haul rate to cover it."

adequate showing that the aggregate charge for the through service is reasonable." 256 I. C. C., at 468. The explicit purpose of the rule in this situation is to guarantee that shippers receiving the same service that they had previously received do not pay an unreasonable amount. See also *Duluth Dockage Absorption,* 44 I. C. C. 300 (1917); *Terminal Charges at Pacific Coast Ports,* 255 I. C. C. 673, 682 (1943). The rule, in this regard, is that the railroads must demonstrate both that the proposed charge is reasonable in light of the costs of the separate service, and that the total charge for line haul plus the separate service is reasonable.

The Commission justified its departure from its prior cases by giving two reasons that relate to this aspect of the rule. First, it noted that "[t]he line-haul rates applicable on the grain to, from, and through [the] inspection points number in the thousands and, because of the complexities of the grain rate structure, vary to a large degree." Thus, applying the general rule "effectively precludes respondents from ever establishing a separate charge for the accessorial first stop for inspection regardless of the need for such a charge." Second, the Commission said that "the line-haul rate applicable to any movement of grain . . . when coupled with the proposed charge is less than the maximum reasonable level determined by this Commission. In no instance will the combined rate and charge exceed the maximum level prescribed in *Grain and Grain Products*[, 205 I. C. C. 301 (1934) and 215 I. C. C. 83 (1936)]." 339 I. C. C., at 386–387.

The maximum rates prescribed in *Grain and Grain Products* have been subjected to a large number of general rate increases.[7] See, *e. g., Ex parte Nos. 265 and*

[7] Currently effective rates are, on almost every route, lower than the rates permitted by the general maximum. See 340 I. C. C., at 71. Often this results from competition from other modes of trans-

267, Increased Freight Rates, 1970 and 1971, 339 I. C. C. 125 (1971). In those proceedings, the Commission's focus is on the general revenue needs of the railroads. Across-the-board percentage increases are permitted without detailed examination of individual rates. As a result, there may be specific routes on which the maximum is in fact unreasonable, because, for example, the costs of operating those routes have not increased as rapidly as the costs elsewhere. Thus, the Commission has held that its approval of a general increase "does not have the effect of approving any particular increased rate as not being in excess of a maximum reasonable rate." *Coal from Illinois to Alton and East St. Louis*, 274 I. C. C. 637, 670 (1949). See also *Tennessee Produce & Chemical Corp.* v. *Alabama G. S. R. Co.*, 277 I. C. C. 207 (1950); *Brimstone R. Co.* v. *United States*, 276 U. S. 104 (1928). However, in other contexts, the Commission has treated the prescribed rates as modified by general increases as "the best evidence of the reasonableness of corresponding rates on a . . . date" after the general increase. *Agsco Chemicals, Inc.* v. *Alabama G. S. R. Co.*, 314 I. C. C. 725, 733 (1961). Cf. *Public Service Comm'n of North Dakota* v. *Great Northern R. Co.*, 340 I. C. C. 739, 750 (1972).

The Commission thus has not determined that a rate which does not exceed the current general maximum is reasonable. A shipper can challenge any such rate as unreasonable and, if he succeeds, may recover reparations. In addition, the Commission may prescribe a rate to be charged in the future. 49 U. S. C. §§ 8, 9, 13 (1), 15(1); *ICC* v. *Inland Waterways Corp.*, 319 U. S. 671, 687 (1943). In such proceedings, the shipper must show that the rate charged was unreasonable. Cf.

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port which forces rates below what the railroads would like to charge.

Louisville & N. R. Co. v. *United States*, 238 U. S. 1 (1915); *Shaw Warehouse Co.* v. *Southern R. Co.*, 288 F. 2d 759 (CA5 1961).[8] In contrast, when a proposed rate increase is challenged by a shipper before it goes into effect, "the burden of proof shall be upon the carrier to show that the proposed changed rate . . . is just and reasonable." 49 U. S. C. § 15 (7).[9]

The Commission in this litigation referred to the burden that applying the rule would place on the railroads. It rather clearly intended by this to suggest that the importance of implementing the new charges and so of increasing the supply of available freight cars justified some modification of its usual allocation of the burden of going forward. Instead of requiring the railroads to produce substantial evidence that the total charges were reasonable, it would leave that determination to later proceedings in which a shipper seeking reparations might point to particular individual charges as unreasonable.

If this were all that was at stake, the Commission would have adequately identified the concerns behind

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[8] MR. JUSTICE WHITE argues that, if a rate at the level of the general maximum is reasonable, and if the separate charge is reasonable, then surely a line-haul rate that is equal to the general maximum less the separate charge is reasonable. The flaw in his argument is that the Commission has never determined that rates at the level of the current general maximum are reasonable. That is, in the example suggested by MR. JUSTICE WHITE, the Commission has not determined what he says that it has "previously found—that 120 is a reasonable charge for both services." Without this premise, his argument fails.

[9] If the Commission finds that the proposed rates are unreasonable, rather than that the railroads failed to carry their burden of proof, that finding might be conclusive in a subsequent proceeding. Cf. *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 258 (1913); *ICC* v. *Atlantic Coast Line R. Co.*, 383 U. S. 576, 590–594 (1966). This does not, however, affect the burden placed on carriers in the suspension proceedings.

its course—in light of the pressing need to increase the freight car supply, it was not too much to require that shippers carry the burden of going forward. Such an assessment would surely permit a reviewing court to determine whether the Commission's action was consistent with congressional transportation policy. Unfortunately, though, the change involved in making the shippers claim that particular rates are unreasonable is not all that is at stake. For in proceedings for reparations, there is also a change in the burden of proof: the shipper must produce substantial evidence that the rate is unreasonable. This would appear to affect the likelihood that the shipper will prevail. There is a zone in which rates are reasonable, *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 506 (1935), and it would seem to be harder to establish that the proposed rates fell outside that zone than that they fell within it. Or so Congress believed, for it specified the allocation of the burden of proof in suspension proceedings as part of the cost to the carriers; in return for confining the power to suspend rates to the Commission, and so of eliminating the threat of long-drawn-out injunctive proceedings in the courts, Congress made the carriers carry a burden of proof that would otherwise not have been theirs. Cf. Part III, *infra*.[10]

[10] The argument urged in support of the Commission's order is, in essence, that the separate charge approved by it was just like a general rate increase because of the breadth of its application. However, the Commission did not use the language characteristic of general increase proceedings. See, *e. g.*, *Ex parte 259, Increased Freight Rates, 1968*, 332 I. C. C. 714, 715, 792 (1969). And, if this were just like a general rate increase, serious questions would arise about the jurisdiction of the District Court to review the Commission's order. See *Atlantic City Electric Co.* v. *United States*, 306 F. Supp. 338 (SDNY 1969); *Alabama Power Co.* v. *United States*, 316 F. Supp. 337 (DC 1969), both aff'd by an equally divided court, 400 U. S. 73 (1970). Yet, although the parties have cited those

The Commission did not suggest that its approval of the proposed rates on the grounds it gave would alter the usual practice in actions for reparations. Nor did it say why the need for an increased supply of freight cars justified a significant change in the burden of proof. In this sense, the Commission's action was, as the District Court noted, "discriminatory per se."

It is even harder to understand from the Commission's opinion why it departed from the rule in prior cases protecting shippers who decide not to have in-transit inspections. If the separate charges are to be effective in alleviating the car-shortage problem, there must be a substantial number of shippers who do not seek in-transit inspections. Yet according to the Commission, the railroads need not show that the present line-haul rates are reasonable charges for the services provided to shippers who do not seek in-transit inspections. It would appear, thus, that the Commission has approved a policy that discriminates against what it hopes will be a very large number of shippers; it seems to have tried to justify its policy by citing reasons that affect only a much smaller class.

Some of the shippers who previously sought in-transit inspections will no longer do so. Others had the opportunity for such inspections. Now the railroads propose to eliminate some of the service previously provided, yet charge the same rates. The Commission in its prior cases has required railroads proposing a similar reduction in service either to show that the rates then in

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cases to us, see Brief for the Interstate Commerce Commission 35; Brief for the Secretary of Agriculture 18; Brief for Wichita Board of Trade 32, they have not contended at any length that the District Court lacked jurisdiction over this litigation. This suggests that the parties, including the Commission, do not interpret the Commission's opinion as resting on the similarity between these cases and general rate increase cases.

effect did not compensate them for the service, and thus that the service was being provided at no charge, or to reduce the existing rates. See, *e. g., Transit Charges, Southern Territory,* 332 I. C. C. 664, 683 (1968); *Loading of Less-Than-Carload Freight on Lighters in Norfolk, Va., Harbor,* 91 I. C. C. 394 (1924); *ICC* v. *Chicago, B. & Q. R. Co.,* 186 U. S. 320 (1902).

Nothing the Commission said suggests any reason why the railroads should not be required to follow the same rule in this case. At no time have rates ever been established, or found just and reasonable, when the railroads did not include the service of in-transit inspection. Perhaps the imperative need to increase the number of freight cars available to all shippers justifies some alteration of the general rule. Yet the Commission, when dealing with shippers who will continue to have in-transit inspections, invoked the fact that the new charges would not raise rates above those permitted by the general maximum. As to that class, the Commission apparently believed that it could not simply refuse to follow preexisting practices on the ground of exigency alone. The Commission offered no reason to distinguish the larger class from the smaller one, in that respect. But it might be that rates for services including an in-transit inspection, at the level of the general maximum, would be reasonable while rates for services without such inspections would be unreasonable at that level, or even below it. Thus, the fact that the new charges will not exceed the general maximum seems to have no bearing on the question of the reasonableness of the rates that will continue to be in force for now-reduced services.[11]

Perhaps the current line-haul rates really do not include a substantial amount attributable to the cost of

[11] The Commission may have intended to leave this question for later proceedings. But this course runs into the difficulties noted *supra,* at 813–814.

providing in-transit inspections. But cf. Tr. 231–232, 258–266. Or perhaps the Commission has some reason to reinterpret the prior cases suggesting that its rule reflects a concern for rates that are "increased" simply because of a reduction in services.

As in *Secretary of Agriculture* v. *United States*, 347 U. S., at 652, the Commission may have reasons for "following a procedure fairly adapted to the unique circumstances of this case." [12] But, as in that case, it must make these reasons known to a reviewing court with sufficient clarity to permit it to do its job. Even giving the Commission's opinion the most sympathetic reading that we find possible, we cannot discover in it an expressed reason for permitting the railroads to reduce their services without showing that the rates they propose to maintain are reasonable rates for the service they intend to provide.

III

After holding that the matter must be remanded to the Interstate Commerce Commission for further proceedings, the District Court ordered, "The proposed charges are suspended and shall be ineffective until and unless otherwise ordered by this Court." No reasons for such an order were given; the District Court did not, for example, specify the nature of the harm to the shippers that would, presumably, injure them irreparably. Nor

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[12] On remand, the Commission might explain more fully the course it followed, or it might adopt a different course, for example, by requiring the carriers to demonstrate the reasonableness of the line-haul rates for services provided without an in-transit inspection on a representative sample of routes. Most of the prior cases in which the Commission invoked the rule involved quite limited problems, often confined to a single route. But cf. *Transit Charges, Southern Territory*, 332 I. C. C. 664 (1968). If the Commission then explained why that procedure was responsive to the needs of the particular case, the prerequisites of judicial review would be satisfied.

did it explain the basis for its apparent belief that *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658 (1963), was distinguishable.

It was error to enter such an injunction. The District Court clearly had power to suspend the operation of the Commission's order pending the final determination of the shippers' suit. That power is given in terms by 28 U. S. C. § 2324: "The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action." But an injunction forbidding the railroads to implement a proposed change in rates is not, strictly speaking, an injunction suspending the Commission's order. In this case, for example, the Commission's order stated that "the proposed new or increased charges for in-transit inspection of grain at various points in the United States are just and reasonable . . . ." 340 I. C. C., at 74. The only consequence of suspending that order is that the railroads may not rely, in some subsequent proceeding, on a Commission finding that the proposed rates were just and reasonable. In an action for reparations, for example, the railroads could not gain any benefit from the purported Commission approval of the increases.[13] See *Arizona Grocery* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370 (1932). See also 49 U. S. C. §§ 1 (5), 10 (1). The Commission's order also provided that the proceeding be discontinued, and suspension of the order requires the Commission to reopen its inquiry.

[13] The Commission may, of course, approve the rates on a theory similar to that discussed in Part II of this opinion, justifying its refusal to require a showing of reasonableness by the fact that that question would be open in subsequent proceedings. A suspension of the Commission order would then have almost no practical meaning.

Carriers may put into effect any rate that the Commission has not declared unreasonable. 49 U. S. C. §§ 6 (3), 15 (1). Suspension of the Commission's order thus does not in itself preclude the carriers from implementing a new rate. The power conferred on the District Court by § 2324 does not in itself include a power to enjoin the railroads from implementing a proposed new charge. Rather, that power must be considered as at best ancillary to the general equitable powers of the reviewing court, and protective of its jurisdiction. See *Arrow Transportation Co.* v. *Southern R. Co., supra,* at 671 n. 22; *Order of Conductors* v. *Pitney,* 326 U. S. 561, 567 (1946). Cf. *Pittsburgh & W. Va. R. Co.* v. *United States,* 281 U. S. 479, 488 (1930); 28 U. S. C. § 1651 (a). As this Court noted in *Scripps-Howard Radio, Inc.* v. *FCC,* 316 U. S. 4 (1942), such a power must be inferred from Congress' decision to permit judicial review of the agency action. "If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made." *Id.,* at 10.

Yet it would be surprising if that power could be exercised to the extent that it might substantially interfere with the function of the administrative agency. "The existence of power in a reviewing court to stay the enforcement of an administrative order does not mean, of course, that its exercise should be without regard to the division of function which the legislature has made between the administrative body and the court of review." *Ibid.* Proper regard for that division of function requires that we hold erroneous the District Court's decision to enjoin not only the Commission's order finding the proposed rates just and reasonable but also the implementation of those rates.

In *Arrow Transportation Co.* v. *Southern R. Co., supra,* this Court considered a similar problem. The Interstate Commerce Commission has the power to suspend proposed rate changes for seven months, while it proceeds to consider the reasonableness of the proposal. "If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate . . . shall go into effect at the end of such period." 49 U. S. C. § 15 (7). In *Arrow,* parties affected by proposed reductions sought an injunction against the implementation of the proposed reductions when, at the end of the suspension period, the railroads announced that they intended to put the new rates into effect. The Commission had not determined that those rates were reasonable. The Court concluded that Congress, by giving the Commission the power to suspend rates, had intended to preclude the courts from doing the same.

Here, of course, the Commission's proceeding has been concluded, or at least so the Commission thought when it entered its order. The terms of § 15 (7) do not specifically govern this situation. Nor is there any other provision in the relevant statutes depriving federal courts of their general equitable power to preserve the status quo to avoid irreparable harm pending review. Yet many of the considerations, relied on in *Arrow* and influencing this Court's definition of the proper relation between the courts and the Interstate Commerce Commission, must be drawn on to delineate guidelines for the exercise of the ancillary power, in a proceeding to review a Commission order, to enjoin a rate increase pending final determination of the suit.

The most important of these considerations is the group of policies that are encompassed by the term "primary jurisdiction." National transportation policy reflects many often-competing interests. Congress has established an administrative agency that has developed

a close understanding of the various interests and that may draw upon its experience to illuminate, for the courts, the play of those interests in a particular case. Cf. *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922); *United States* v. *Western Pacific R. Co.*, 352 U. S. 59 (1956). Ordinarily, then, a court should refrain from expressing a preliminary view on what national transportation policy permits, before the ICC expresses its view. But when a court issues an injunction pending final determination, one important element of its judgment is its estimate of the probability of ultimate success on the merits by the party challenging the agency action. *Virginia Petroleum Jobbers Assn.* v. *FPC*, 104 U. S. App. D. C. 106, 110, 259 F. 2d 921, 925 (1958). Depending on the type of error the reviewing court finds in the administrative proceedings, the issuance of an injunction pending further administrative action may indicate what the court believes is permitted by national transportation policy, prior to an expression by the Commission of its view. This is precisely what the doctrine of primary jurisdiction is designed to avoid. Cf. *Order of Conductors* v. *Pitney, supra; Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U. S. 528, 533 (1960). The fact that issuing an injunction may undercut the policies served by the doctrine of primary jurisdiction is therefore an important element to be considered when a federal court contemplates such action.[14]

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[14] *Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U. S. 528 (1960), shows that not all judicial injunctions infringe on an agency's primary jurisdiction. There the Court noted that the District Court's "examination of the nature of the dispute is so unlike that which the [agency] will make of the merits of the same dispute, and is for such a dissimilar purpose, that it could not interfere with the later consideration of the grievance by the [agency]." *Id.*, at 534. Here, in contrast, the District Court must consider whether the Commission is likely to find reasons for its

As we have indicated in Part II of this opinion, we require the agency to justify its departure from its prior decisions so that we may understand what policies it is pursuing. If a reviewing court cannot discern those policies, it may remand the case to the agency for clarification and further justification of the departure from precedent. But an injunction pending the completion of those proceedings would be warranted only if the reviewing court entertained substantial doubt about the consistency of the Commission's action with its mandate from Congress. Cf. *Virginian R. Co.* v. *United States*, 272 U. S. 658, 673 (1926).[15] When a case is remanded on the ground that the agency's policies are unclear, an injunction ordinarily interferes with the primary jurisdiction of the Commission.[16] Cf. *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S., at 669–670.

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action that are consistent with congressional policy. Not only is such a question exceedingly complex, it is also just what the Commission itself must decide before approving the proposed new charges.

[15] In some cases, the reviewing court might explicitly refrain from considering the likelihood of success on the merits in deciding whether or not to issue an injunction. Then, if the possibility of irreparable damage to the party seeking review or to other interests is great enough, an injunction may perhaps be justified. See, *e. g.*, *Semmes Motors, Inc.* v. *Ford Motor Co.*, 429 F. 2d 1197, 1205–1206 (CA2 1970); *Checker Motors Corp.* v. *Chrysler Corp.*, 405 F. 2d 319, 323 (CA2 1969). Here, however, the District Court did not clearly refuse to assess the likelihood of ultimate success and, as indicated *infra*, the possibility of irreparable harm to the shippers is quite small.

[16] This analysis turns on the fact that the type of error in these cases involves precisely a failure by the Commission to do the job committed to it, the proper performance of which is a predicate of the doctrine of primary jurisdiction. Where the error might be considered purely procedural, for example where the Commission failed to consider relevant evidence on grounds the reviewing court finds inadequate, the issuance of an injunction might not interfere with

In addition, the reviewing court must consider whether irreparable harm will result if the injunction is not issued and the party seeking it prevails on the merits. *Order of Conductors* v. *Pitney, supra.* That too may interfere with the agency's primary jurisdiction. We deal here with a dispute between shippers and carriers. In giving the Interstate Commerce Commission power to suspend proposed rate increases, Congress allocated the benefit and harm of a suspension. For a period of up to seven months, the carriers may not collect the increases if the Commission suspends them. The income that they might have gained is lost to them forever. Congress did provide protection to shippers for the period after the rates go into effect. The Commission may require the carriers to keep detailed accounts of the income received as a result of the increase. If the in-

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the agency's primary jurisdiction quite so severely. Yet even there, before issuing an injunction the reviewing court must consider whether the Commission would have come to a different conclusion had it considered the evidence. And that may sometimes impinge on the sphere committed to the Commission for initial decision.

This Court has distinguished between blatantly lawless action and mere procedural error in cases raising similar questions of the power of courts to intervene in administrative action. See *Oestereich* v. *Selective Service Bd.*, 393 U. S. 233 (1968); *Fein* v. *Selective Service System*, 405 U. S. 365 (1972).

Different considerations would come into play, too, when the reviewing court finds some failure by the carriers in the suspension proceeding, rather than a failure by the Commission to do its task. A reviewing court might find, for example, that the Commission's conclusion that the carriers had carried the burden of proof to justify the increase was not supported by substantial evidence. Although phrased as a finding of administrative error, this in fact relates to the presentation of evidence by the carriers.

Finally, this litigation involves only claims under the Interstate Commerce Act. Subsequent legislation might affect the relation between court and agency and so the propriety of injunctive relief. Whether it does so must be determined by examining that legislation.

crease is ultimately found unjustified, the Commission may order a refund. 49 U. S. C. § 15 (7). Even if the Commission does not do so in a suspension proceeding, the shippers may recover reparations under some circumstances. 49 U. S. C. §§ 8, 9. Thus, it is often quite unlikely that shippers will be irreparably damaged by the implementation of a rate increase.[17]

There are, however, public interests at stake in this litigation, as well as the private interests of the shippers and carriers. The Commission found that inspection of grain is required for the orderly marketing of grain. 339 I. C. C., at 385. Inspections will thus continue to be made. But now, if the Commission ultimately approves the new charges, there will be a separate charge for them, either by the railroads under the new charges, or by someone else engaged in marketing grain. This extra cost must be absorbed by someone, perhaps by farmers, perhaps by the ultimate consumers of grain. See Tr. 1299. The impact of rates on various groups in this country is surely relevant to deciding that the rates are consistent with national transportation policy.

But the public interest is not a simple fact, easily determined by courts. Here, for example, the interests of farmers and consumers of grain must be balanced against the interests of producers and consumers of all sorts of other goods shipped by rail. For the premise of the Commission's action in this case was that separate charges for in-transit inspections would alleviate the freight-car shortage. The shortage itself increases the

[17] The interests of other carriers who might object to a proposed rate change are somewhat different. They are not damaged, as the shippers are, by out-of-pocket expenditures, and refunds or reparations do not remedy the loss of business that they might suffer. This factor would thus have less weight in suits by such carriers, although the problem of interfering with primary jurisdiction must still be considered.

cost of transporting a wide range of products by rail. Thus, the decision that must be made is whether the car shortage has a more significant impact on the national economy than does increased cost for grain products. Congress has committed that decision to the Interstate Commerce Commission in the first instance, and the extent of harm to farmers and consumers of grain cannot be estimated without interfering with the primary jurisdiction of the Commission.[18]

As this discussion shows, it is very likely that a decision to enjoin rates pending reconsideration by the Commission in order to clarify its policies will imply some view by the District Court about decisions committed to the Commission by the doctrine of primary jurisdiction. The District Court's power to enjoin rates, in order to protect its jurisdiction to review Commission orders, must therefore be exercised with great care and after full

[18] Although they are far less substantial than the problems of primary jurisdiction and irreparable injury, procedural problems might also arise when a district court considers a request for an injunction like that issued here. Review of Commission orders is by a three-judge district court. The United States is the defendant. 28 U. S. C. §§ 2321, 2322. Railroads which appeared before the Commission have a right to intervene, 28 U. S. C. § 2323, but they need not do so. If a railroad chose not to intervene, the district court could not enjoin it from implementing the new charge. The plaintiffs could, of course, compel an unwilling railroad to appear. Fed. Rule Civ. Proc. 19 (a). But, even though service of process is nationwide, 28 U. S. C. § 2321, some plaintiffs might find it difficult to serve every railroad that did not appear willingly. The presence before the reviewing court of all interested parties, or only some of them, is therefore relevant to the exercise of the court's discretion to enjoin a proposed rate increase. Like the other factors discussed in this opinion, this does not establish that the district court lacks power to enjoin the implementation of proposed rate increases after a final Commission order, but it is a factor to be considered in determining whether to exercise equitable discretion to issue such an injunction.

and detailed consideration of the problems set out above. It will not do to enter such an injunction in the offhand manner of the District Court. Cf. *Virginian R. Co.* v. *United States*, 272 U. S. 658 (1926). Here the District Court could not consider the likelihood of success on the merits or where the public interest lies without infringing on decisions committed by Congress to the primary jurisdiction of the Interstate Commerce Commission, and the possibility of harm to the shippers was small. It was therefore improper to enter an injunction against the implementation of the proposed new charges.

Here the Commission ordered the railroads to maintain records of the amounts collected as a result of the new charge. It may be that this adequately protects the shippers from irreparable damage, in light of the availability of actions for reparations. The Commission may determine on remand that some further steps must be taken to protect the shippers. But in any event, it is clear that the District Court should not have entered the injunction it did. The action of the District Court is affirmed as to the remand to the Commission and is reversed as to the injunction suspending the proposed charges.

So ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of these cases.

MR. JUSTICE DOUGLAS, concurring in the affirmance of the remand to the Commission and dissenting from the reversal of the decree authorizing the injunction.

Though I concur in the affirmance of the remand to the Interstate Commerce Commission, I dissent from the reversal of the decree authorizing the injunction, since in my view the District Court was quite correct in issuing its injunction. *Arrow Transportation Co.* v.

Southern R. Co., 372 U. S. 658, is not relevant here, for the reason that 49 U. S. C. § 15 (7) only purports to control the suspension of rates up until the time the Commission has rendered a decision. After that decision has been made, the reviewing court has, I believe, the power to enjoin the affected rates. The new charges which the Commission would impose would have an immediate impact upon the grain-marketing system. It would affect the volume of business of the grain merchants, it would affect the employment of grain inspectors, and it would result in lower prices being paid to the farmers. None of these incidences can be remedied under the existing statutory scheme, because none of these interests is enabled to bring suit for a later rate refund. Hence, in my view, the grain trade and the farmers need this interim protection lest in inspection the marketing system suffer severe attrition during the period of remand. The deciding principle is that the District Court sits as a court of equity, *United States* v. *Morgan*, 307 U. S. 183, 191, and as a court of equity has, I believe, ample power to protect the grain market nationally which would otherwise be without remedy under the existing statutory regime.

Jurisdiction is granted the District Court "to enforce, enjoin, set aside, annul or suspend" any order of the Interstate Commerce Commission. 28 U. S. C. § 1336 (a). For years, the type of order here involved* was not reviewable. See *Procter & Gamble Co.* v. *United States*, 225 U. S. 282. But that "negative" order concept was abandoned in *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 145. The provisions of 28 U. S. C. § 1336 (a), are an explicit grant of power to

*The order of Division 2 of the Commission provided that the proceeding "be, and it is hereby, discontinued." 339 I. C. C. 364, 401. The order of the Commission en banc affirming is in 340 I. C. C. 69, 74.

provide injunctive relief. Under that Act the "governing principle" is "that it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interests the injunction may affect." *Inland Steel Co.* v. *United States*, 306 U. S. 153, 157. That power exists whether the Commission's authority over rates is challenged under 49 U. S. C. § 15 (1) as being unjust or unreasonable or under 49 U. S. C. § 15 (7) relating, as here, to "a new individual or joint rate, fare, or charge." In all cases the District Court by reason of 28 U. S. C. § 1336 (a) sits as a court of equity.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE REHNQUIST join, concurring in the reversal of the injunction and dissenting from the affirmance of the remand to the Commission.

I dissent because the District Court erred both in holding that the Commission had inadequately explained the basis for its judgment and in suspending the new in-transit inspection tariff beyond the time the statute permits new rates to be suspended without a finding that they are unjust and unreasonable.

As to the latter, 49 U. S. C. § 15 (7) forbids the suspension of new freight rates for more than seven months without the requisite finding of unreasonableness by the Commission. Only the Commission may suspend in the first instance; and if the agency refuses to do so, the court is powerless itself to suspend. The Commission may postpone effectiveness of new rates for seven months, but if it does, the statute commands that, absent the appropriate order of the Commission within that period, "the proposed change of rate . . . shall go into effect . . . ." To permit the District Court nevertheless to extend this period seems to me to be flatly contrary to the will of Congress. I therefore cannot

agree that, although the District Court has no statutory power to do so, it nevertheless retains sufficient power to enjoin the rates as "ancillary to the general equitable powers of the reviewing court, and protective of its jurisdiction." *Ante*, at 819. As I see it, the District Court contravened the precepts of *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658 (1963).

As for the remand to the Commission, there is somewhat more to be said. The Commission found, and it is not questioned by the District Court or by the majority here, that in-transit inspection of grain is not an essential part of transportation service but only ancillary to it; that the premarketing inspection of grain, in transit or otherwise, is no longer required by federal law; that in-transit inspection of grain has been the regular practice in Western territory, to some extent the practice in Southern territory, but not in Eastern territory; that the line-haul rates for grain in Western and Southern territories established by the railroads or prescribed by the Commission have provided one free in-transit inspection stop, but a separate charge for that service is the practice in Eastern territory; [1] and that, because of recent developments in-transit inspection is no longer an essential service

[1] The Commission noted:

"It is again emphasized that the major impact of the proposal under consideration will be on the movement of grain in the western district. Most inspections occur in this territory. There is presently effective a separate charge for this service in the East. A substantial increase in those charges will result, however, if the proposed charges are permitted to become effective. The number of in-transit inspections in the South is limited and take place chiefly at the ports on export grain tonnage. There is little, if any, opposition to establishment of the charges in southern territory. Practically all of the controversy is concerned with establishment of the separate charge for the first inspection of grain within the western district." 339 I. C. C. 364, 385.

for the orderly marketing of grain in Western and Southern territories. Furthermore, the unquestioned finding of the Commission was that the principal motivation for imposing a separate charge for in-transit grain inspection was not to increase railroad revenues through collection of the charge itself but to promote efficient utilization of freight cars by discouraging the practice of in-transit inspection which had proved extremely wasteful in terms of car utilization. The Commission finding, also undisturbed, was that the separately stated inspection fee would discourage the practice of in-transit inspection, would contribute to a more efficient utilization of freight cars, and hence help relieve the unquestioned grain-car shortage.

With these important preliminary findings and conclusions behind it, the Commission examined in detail the reasonableness of the separate charge being imposed for in-transit inspection of grain. Its conclusion was that the charge was reasonable, a judgment not overturned either here or in the District Court. Finally, the Commission noted that by the terms of the new tariff itself, separate in-transit inspection charges could not be collected where the combination of the new, separate charge and the existing line-haul rate exceeded the maximum reasonable level of grain rates established in Docket 17,000, pt. 7, *Grain and Grain Products,* 205 I. C. C. 301 (1934); 215 I. C. C. 83 (1936), as raised by subsequent general revenue increases. Docket 17,000, pt. 7, *Rate Structure Investigation,* was a major national effort, a comprehensive investigation of rates on agricultural products, and resulted, among other things, in the Commission's prescribing maximum reasonable freight rate levels for movements of grain. Since that time, there have been general rate increases for revenue purposes, in the course of which the rates on grain and their structure as required by the 1934 and 1936 determinations have

been given special attention. See, for example, *Increased Freight Rates, 1967,* 332 I. C. C. 280, 300 (1968).

Under the new tariffs now filed, as I have said, if the applicable line-haul rate on the particular grain movement involved is at the maximum reasonable level theretofore prescribed by the Commission in previous proceedings, no separate in-transit inspection charge is imposed or allowable, nor may the combination of the new charge and the existing line-haul rate collected by the railroad exceed the maximum allowable rate as previously determined. This is the key to understanding that, in approving the separate inspection charge, the Commission did not ignore its longstanding rule that railroads may not impose separate charges for an ancillary service previously furnished under a line-haul rate unless both the reasonableness of the separate charge and the line-haul rate are scrutinized. *Transit Charges, Southern Territory,* 332 I. C. C. 664, 683–684 (1968), is, for example a relatively recent restatement of the rule.[2] The Commission thought this rule not controlling here because, in the first place, the magnitude of the task of justifying each one of a countless number of line-haul grain rates would, as a practical matter, prohibit the imposition of a separate in-transit inspection charge and so frustrate the important nonrevenue goal of discouraging in-transit inspection and so improving car utilization.

But, more fundamentally, the Commission in any event deemed the rule satisfied; for here the reasonableness of

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[2] The Commission's order was sustained, on other grounds, in *Cincinnati, N. O. & T. P. R. Co.* v. *United States,* Civil Action No. 6692 (SD Ohio, Jan. 12, 1970), aff'd, 400 U. S. 932 (1970). The District Court sustained the Commission on the basis that the proposed increase in charges might well result in a substantial diversion of the considered traffic, with a diminution, rather than an increase, in revenues. In the present case, the Commission noted: "Similar conclusions are not warranted here."

the line-haul rate was sufficiently examined and ensured by proof that the new charge was itself reasonable *and* by prohibiting its collection if the total cost of the grain movement—its line-haul charge plus the separate inspection charge—exceeded the maximum reasonable rate theretofore prescribed by the Commission, that is, the maximum reasonable rate the Commission had *theretofore prescribed for both the transportation service and the privilege of in-transit inspection.*

This approach seems straightforward and adequate. Keeping in mind that Docket 17,000, Part 7, as was customary in Western territory, prescribed rates for grain movements permitting one in-transit inspection without extra charge, let us assume, for example, that the maximum rate prescribed by the Commission for a particular grain movement with in-transit inspection privileges was 120. Assume further what is the recurring situation in the case before us—that the railroad is charging less than it may, say 100, for the grain movement with that privilege. The railroad then publishes a tariff under which the line-haul rate of 100 no longer entitles the shipper to in-transit inspection, and a separate charge of 20 is imposed on those who want that service. The line-haul charge plus the separate in-transit inspection charge does not exceed what the Commission has heretofore ruled the railroad may collect for both the transportation and the inspection service. This calculus seems to me an adequate basis for concluding that the line-haul rate of 100 is itself within the zone of reasonableness. If a railroad may charge 120 for a grain movement with in-transit inspection provided, and the inspection stop is proved reasonably worth 20, why should there also be occasion for considering the reasonableness of 100 as a line-haul rate and so proving again what the Commission previously found—that 120 is a reasonable charge for both services?

The District Court thought the Commission ignored *Secretary of Agriculture* v. *United States*, 347 U. S. 645 (1954), but I read that case far differently. There the Court, although being of the opinion that the Commission had not adequately explained why it was approving a separate charge without examining the legality of the line-haul rate, was careful to point out that the Commission was not precluded "from following a procedure fairly adapted to the unique circumstances of this case"; nor did the Court question "the Commission's power, under appropriate findings, to approve such unloading charges without pursuing one of these courses. In dealing with technical and complex matters like these, the Commission must necessarily have wide discretion in formulating appropriate solutions." *Id.*, at 652. That case does not stand for the rule that a separate charge for an ancillary service may in no circumstances be permitted without new proof in *that* proceeding of the reasonableness of the line-haul rate.

The prior decisions of the Commission relied upon by the District Court establish clearly enough that the Commission must be satisfied with the reasonableness of the line-haul rate as an exaction for the remaining services before approving a separate charge for a service previously covered by the line-haul rate. *Transit Charges, Southern Territory, supra; Terminal Charges at Pacific Coast Ports*, 255 I. C. C. 673 (1943); *Reconsignment Case No. 3*, 53 I. C. C. 455 (1919); *Loading of Less-Than-Carload Freight on Lighters in Norfolk, Va., Harbor*, 91 I. C. C. 394 (1924). In these cases, the carriers simply failed to carry their burden of proof.

The District Court also cited for this proposition *Grand Forks Chamber of Commerce* v. *Great Northern R. Co.*, 321 I. C. C. 356 (1963), but the Commission in that case, see *id.*, at 360–362, did precisely what it has done in this one: it approved a separate in-transit in-

spection charge in the case of so-called Group 3 rates where the line-haul rate and the new charge together were less than so-called Group 1 rates prescribed in *Grain and Grain Products*, 205 I. C. C. 301 (1934); 215 I. C. C. 83 (1936). See also *Public Service Comm'n of North Dakota* v. *Great Northern R. Co.*, 340 I. C. C. 739 (1972); *Alabama State Docks Dept.* v. *Alabama, T. & N. R. Co.*, 321 I. C. C. 347 (1963); *Agsco Chemicals, Inc.* v. *Alabama G. S. R. Co.*, 314 I. C. C. 725 (1961).

Neither do I understand why the majority is comforted by the opinion in *Cincinnati N. O. & T. P. R. Co.* v. *United States*, Civil Action No. 6992 (SD Ohio, Jan. 12, 1970), in which the District Court affirmed, but on very limited grounds (grounds that would save the cases before us now), the Commission's disallowance of a separate transit charge for cotton movements but disapproved the stringent standard by which the Commission required the railroads to prove the reasonableness of the resulting line-haul rate. The District Court restated the prevailing rubric:

> "The question here is what should the carrier be paid for a service which it has been rendering, and has been charging for, and has been paid for (one knoweth not what) which it proposes to separate and charge separately for. Both the courts and the Commission have consistently held that what is a just and reasonable rate for the service to be separated and charged for separately cannot be determined by examining only the typical questions of cost, etc., with respect to the separate service. On the contrary, the typical questions must be directed to the overall or combined picture so that one may conclude (a) that the rate for the separated service, looked at by itself in the light of the applicable questions, is just and reasonable; and (b) that the

> remaining rate for the services, sans the separated service, is not rendered unjust or unreasonable."

The District Court continued:

> "Whether the examination is in terms of 'what portion of the line-haul rate represented the rate for the service to be separated,' or whether the search in terminology is for the answer to this question: *Does the new aggregate rate, composed of line-haul plus transit rates represent a just and reasonable rate for all of the services (the aggregate of the severed and the nonsevered)—the principle is the same.*" (Emphasis added.)

A few paragraphs later, the court repeated the same alternate approach. This Court affirmed the District Court summarily. 400 U. S. 932 (1970). In the litigation now before us the total of the line-haul rate and the separate in-transit charge will in no case exceed what the Commission has heretofore found to be a reasonable charge for the aggregate service.

The maximum permissible rates for grain movements with in-transit inspection privileges were established some years ago, it is true, but they have been subject to repeated examination upon the occasions of general rate increases and, as this litigation itself shows, they are far from dead letters from the standpoint of either the railroads or the Commission. They remain the foundation of the Commission's opinion as to what just and reasonable grain rates are with in-transit privileges furnished by the railroad. I see no reason for now disagreeing with the Commission's judgment that the reasonableness of a line-haul rate lower than the maximum allowable has been sufficiently re-examined to permit imposition of a separate in-transit inspection charge, in itself found reasonable, when it is also determined that the existing

line-haul rate and the new inspection charge together total less than the maximum Commission-prescribed rate for the two services combined. Surely this presents an inadequate occasion or context in which to frustrate what the Commission found to be a promising effort to solve a critical problem—the freight car shortage—by seeking to deter a wasteful practice not indispensable or even, in the Commission's view, unusually important to the orderly marketing of grain under modern conditions.

For these reasons, I respectfully dissent.

Syllabus

BARNES *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72–5443. Argued March 20, 1973—Decided June 18, 1973

Petitioner was convicted of possessing United States Treasury checks stolen from the mails, knowing them to be stolen; forging; and uttering the checks, knowing the endorsements to be forged. The District Court instructed the jury that "[p]ossession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen." The Court of Appeals affirmed, finding no lack of "rational connection" between unexplained possession of recently stolen property and knowledge that the property was stolen. *Held:* The instruction comports with due process. Pp. 841–847.

(a) If a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard (*i. e.*, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process. Pp. 841–843.

(b) Here, where the evidence established that petitioner possessed recently stolen Treasury checks payable to persons he did not know and it provided no plausible explanation for such possession consistent with innocence, the traditional common-law inference satisfies the reasonable-doubt standard, the most stringent standard applied by the Court in judging permissive criminal law inferences, and, therefore, comports with due process. Pp. 843–846.

(c) Although the introduction of any evidence, direct or circumstantial, tending to implicate the defendant in the alleged crime increases the pressure on him to testify, the mere massing of evidence against him cannot be regarded as a violation of his privilege against self-incrimination. *Yee Ham* v. *United States*, 268 U. S. 178, 185. Pp. 846–847.

(d) In light of its legislative history and consistent judicial construction, 18 U. S. C. § 1708 requires only knowledge that the

checks were stolen, and not knowledge that they were stolen from the mails. P. 847.

466 F. 2d 1361, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 848. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 852.

Malcolm H. Mackey, by appointment of the Court, 411 U. S. 946, argued the cause and filed a brief for petitioner.

Deputy Solicitor General Friedman argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Petersen, Mark L. Evans*, and *Sidney M. Glazer*.

MR. JUSTICE POWELL delivered the opinion of the Court.

Petitioner Barnes was convicted in United States District Court on two counts of possessing United States Treasury checks stolen from the mails, knowing them to be stolen, two counts of forging the checks, and two counts of uttering the checks, knowing the endorsements to be forged. The trial court instructed the jury that ordinarily it would be justified in inferring from unexplained possession of recently stolen mail that the defendant possessed the mail with knowledge that it was stolen. We granted certiorari to consider whether this instruction comports with due process. 409 U. S. 1037 (1972).

The evidence at petitioner's trial established that on June 2, 1971, he opened a checking account using the pseudonym "Clarence Smith." On July 1, and July 3, 1971, the United States Disbursing Office at San Francisco mailed four Government checks in the amounts of

$269.02, $154.70, $184, and $268.80 to Nettie Lewis, Albert Young, Arthur Salazar, and Mary Hernandez, respectively. On July 8, 1971, petitioner deposited these four checks into the "Smith" account. Each check bore the apparent endorsement of the payee and a second endorsement by "Clarence Smith."

At petitioner's trial the four payees testified that they had never received, endorsed, or authorized endorsement of the checks. A Government handwriting expert testified that petitioner had made the "Clarence Smith" endorsement on all four checks and that he had signed the payees' names on the Lewis and Hernandez checks.[1] Although petitioner did not take the stand, a postal inspector testified to certain statements made by petitioner at a post-arrest interview. Petitioner explained to the inspector that he received the checks in question from people who sold furniture for him door to door and that the checks had been signed in the payees' names when he received them. Petitioner further stated that he could not name or identify any of the salespeople. Nor could he substantiate the existence of any furniture orders because the salespeople allegedly wrote their orders on scratch paper that had not been retained. Petitioner admitted that he executed the Clarence Smith endorsements and deposited the checks but denied making the payees' endorsements.[2]

The District Court instructed the jury that "[p]ossession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light

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[1] The witness' findings with respect to the Young and Salazar signatures were inconclusive.

[2] This explanation of petitioner's possession of the checks, presented through the postal inspector's testimony, was adopted by petitioner's counsel in argument to the jury. Tr. 107–108.

of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen." [3]

The jury brought in guilty verdicts on all six counts, and the District Court sentenced petitioner to concurrent three-year prison terms. The Court of Appeals for

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[3] The full instruction on the inference arising from possession of stolen property stated:

"Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.

"However, you are never required to make this inference. It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in this case warrant any inference which the law permits the jury to draw from the possession of recently stolen property.

"The term 'recently' is a relative term, and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property, and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

"If you should find beyond a reasonable doubt from the evidence in the case that the mail described in the indictment was stolen, and that while recently stolen the contents of said mail here, the four United States Treasury checks, were in the possession of the defendant you would ordinarily be justified in drawing from those facts the inference that the contents were possessed by the accused with knowledge that it was stolen property, unless such possession is explained by facts and circumstances in this case which are in some way consistent with the defendant's innocence.

"In considering whether possession of recently stolen property has been satisfactorily explained, you are reminded that in the exercise of constitutional rights the accused need not take the witness stand and testify.

"Possession may be satisfactorily explained through other circumstances, other evidence, independent of any testimony of the accused." Tr. 123–124.

the Ninth Circuit affirmed, finding no lack of "rational connection" between unexplained possession of recently stolen property and knowledge that the property was stolen. 466 F. 2d 1361 (1972). Because petitioner received identical concurrent sentences on all six counts, the court declined to consider his challenges to conviction on the forgery and uttering counts. We affirm.

I

We begin our consideration of the challenged jury instruction with a review of four recent decisions which have considered the validity under the Due Process Clause of criminal law presumptions and inferences. *Turner* v. *United States*, 396 U. S. 398 (1970); *Leary* v. *United States*, 395 U. S. 6 (1969); *United States* v. *Romano*, 382 U. S. 136 (1965); *United States* v. *Gainey*, 380 U. S. 63 (1965).

In *United States* v. *Gainey*, *supra*, the Court sustained the constitutionality of an instruction tracking a statute which authorized the jury to infer from defendant's unexplained presence at an illegal still that he was carrying on "the business of a distiller or rectifier without having given bond as required by law." Relying on the holding of *Tot* v. *United States*, 319 U. S. 463, 467 (1943), that there must be a "rational connection between the fact proved and the ultimate fact presumed," the Court upheld the inference on the basis of the comprehensive nature of the "carrying on" offense and the common knowledge that illegal stills are secluded, secret operations. The following Term the Court determined, however, that presence at an illegal still could not support the inference that the defendant was in possession, custody, or control of the still, a narrower offense. "Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its connection with possession is too tenuous to

permit a reasonable inference of guilt—'the inference of the one from proof of the other is arbitrary . . . .' *Tot* v. *United States*, 319 U. S. 463, 467." *United States* v. *Romano*, *supra*, at 141.

Three and one-half years after *Romano*, the Court in *Leary* v. *United States*, *supra*, considered a challenge to a statutory inference that possession of marihuana, unless satisfactorily explained, was sufficient to prove that the defendant knew that the marihuana had been illegally imported into the United States. The Court concluded that in view of the significant possibility that any given marihuana was domestically grown and the improbability that a marihuana user would know whether his marihuana was of domestic or imported origin, the inference did not meet the standards set by *Tot*, *Gainey*, and *Romano*. Referring to these three cases, the *Leary* Court stated that an inference is " 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 395 U. S., at 36. In a footnote the Court stated that since the challenged inference failed to satisfy the more-likely-than-not standard, it did not have to "reach the question whether a criminal presumption which passes muster when so judged must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use." *Id.*, at 36 n. 64.

Finally, in *Turner* v. *United States*, *supra*, decided the year following *Leary*, the Court considered the constitutionality of instructing the jury that it may infer from possession of heroin and cocaine that the defendant knew these drugs had been illegally imported.[4] The Court

[4] The *Turner* Court also considered the validity of inferring that a defendant knowingly purchased, sold, dispensed, or distributed a

noted that *Leary* reserved the question of whether the more-likely-than-not or the reasonable-doubt standard controlled in criminal cases, but it likewise found no need to resolve that question. It held that the inference with regard to heroin was valid judged by either standard. 396 U. S., at 416. With regard to cocaine, the inference failed to satisfy even the more-likely-than-not standard. *Id.*, at 419.

The teaching of the foregoing cases is not altogether clear. To the extent that the "rational connection," "more likely than not," and "reasonable doubt" standards bear ambiguous relationships to one another, the ambiguity is traceable in large part to variations in language and focus rather than to differences of substance. What has been established by the cases, however, is at least this: that if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process.

In the present case we deal with a traditional common-law inference deeply rooted in our law. For centuries courts have instructed juries that an inference of guilty knowledge may be drawn from the fact of unexplained possession of stolen goods. James Thayer, writing in his Preliminary Treatise on Evidence (1898), cited this inference as the descendant of a presumption "running

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narcotic drug not in or from the original package bearing tax stamps from the fact that the drugs had no tax stamps when found in the defendant's possession. 26 U. S. C. § 4704 (a) (1964 ed.). The Court upheld the inference that a defendant possessing unstamped heroin knowingly purchased it in violation of the statute, but struck down the inference with regard to cocaine. 396 U. S., 398, 419–424.

through a dozen centuries." [5] *Id.*, at 327. Early American cases consistently upheld instructions permitting conviction upon such an inference,[6] and the courts of appeals on numerous occasions have approved instructions essentially identical to the instruction given in this case.[7] This longstanding and consistent judicial approval of the instruction, reflecting accumulated common experience, provides strong indication that the instruction comports with due process.

This impressive historical basis, however, is not in itself sufficient to establish the instruction's constitutionality. Common-law inferences, like their statutory counterparts, must satisfy due process standards in light of

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[5] Thayer also described the historical development of the presumption:

"[T]he laws of Ine [King of Wessex, A. D. 688–725] provide that, 'if stolen property be attached with a chapman, and he have not brought it before good witnesses, let him prove . . . that he was neither privy (to the theft) nor thief; or pay as *wite* (fine) xxxvi shillings.' To be found thus in the possession of stolen goods was a serious thing; if they were recently stolen, then was one 'taken with the mainour,'—a state of things that formerly might involve immediate punishment, without a trial; and, later, a trial without a formal accusation; and, later still, a presumption of guilt which, in the absence of contrary evidence, justified a verdict, and at the present time is vanishing away into the mere judicial recognition of a permissible inference . . . ." *Id.*, at 328. (Citations omitted.)

[6] See, *e. g.*, *Wilson* v. *United States*, 162 U. S. 613 (1896); *Commonwealth* v. *Millard*, 1 Mass. 6 (1804); *Knickerbocker* v. *People*, 43 N. Y. 177 (1870); *State* v. *Raymond*, 46 Conn. 345 (1878); *Cook* v. *State*, 84 Tenn. 461 (1886).

[7] *E. g.*, *United States* v. *Russo*, 413 F. 2d 432 (CA2 1969); *United States* v. *Smith*, 446 F. 2d 200 (CA4 1971); *United States* v. *Winbush*, 428 F. 2d 357 (CA6), cert. denied, 400 U. S. 918 (1970); *United States* v. *Hood*, 422 F. 2d 737 (CA7), cert. denied, 400 U. S. 820 (1970); *United States* v. *Dilella*, 354 F. 2d 584 (CA7 1965).

present-day experience.[8] In the present case the challenged instruction only permitted the inference of guilt from *unexplained* possession of recently stolen property.[9] The evidence established that petitioner possessed recently stolen Treasury checks payable to persons he did not know, and it provided no plausible explanation for such possession consistent with innocence. On the basis of this evidence alone common sense and experience tell us that petitioner must have known or been aware of the high probability that the checks were stolen. Cf. *Turner* v. *United States*, 396 U. S., at 417;[10] *Leary* v. *United States*, 395 U. S., at 46. Such evidence was clearly sufficient to enable the jury to find beyond a reasonable doubt that petitioner knew the checks were

[8] The reasoning of the statutory-inference cases is applicable to analysis of common-law inferences. Cf. *United States* v. *Gainey*, 380 U. S. 63, 70 (1965); Rules of Evidence for United States Courts and Magistrates (proposed Nov. 20, 1972), Rule 303 (a), 56 F. R. D. 212. Common-law inferences, however, present fewer constitutional problems. Such inferences are invoked only in the discretion of the trial judge. While statutes creating criminal law inferences may be interpreted also to preserve the trial court's traditional discretion in determining whether there is sufficient evidence to go to the jury and in charging the jury, *Turner* v. *United States*, 396 U. S. 398, 406 n. 6 (1970); *United States* v. *Gainey*, *supra*, at 68–70, such discretion is inherent in the use of common-law inferences.

[9] Of course, the mere fact that there is some evidence tending to explain a defendant's possession consistent with innocence does not bar instructing the jury on the inference. The jury must weigh the explanation to determine whether it is "satisfactory." *Supra*, at 840 n. 3. The jury is not bound to accept or believe any particular explanation any more than it is bound to accept the correctness of the inference. But the burden of proving beyond a reasonable doubt that the defendant did have knowledge that the property was stolen, an essential element of the crime, remains on the Government.

[10] " 'Common sense' . . . tells us that those who traffic in heroin will inevitably become aware that the product they deal in is smuggled, unless they practice a studied ignorance to which they are not entitled."

stolen. Since the inference thus satisfies the reasonable-doubt standard, the most stringent standard the Court has applied in judging permissive criminal law inferences, we conclude that it satisfies the requirements of due process.[11]

II

Petitioner also argues that the permissive inference in question infringes his privilege against self-incrimination. The Court has twice rejected this argument,[12] *Turner* v. *United States*, 396 U. S., at 417–418; *Yee Hem* v. *United States*, 268 U. S. 178, 185 (1925), and we find no reason to re-examine the issue at length. The trial court specifically instructed the jury that petitioner had a constitutional right not to take the witness stand and that possession could be satisfactorily explained by

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[11] It is true that the practical effect of instructing the jury on the inference arising from unexplained possession of recently stolen property is to shift the burden of going forward with evidence to the defendant. If the Government proves possession and nothing more, this evidence remains unexplained unless the defendant introduces evidence, since ordinarily the Government's evidence will not provide an explanation of his possession consistent with innocence. In *Tot* v. *United States*, 319 U. S. 463 (1943), the Court stated that the burden of going forward may not be freely shifted to the defendant. See also *Leary* v. *United States*, 395 U. S. 6, 44–45 (1969). *Tot* held, however, that where there is a "rational connection" between the facts proved and the fact presumed or inferred, it is permissible to shift the burden of going forward to the defendant. Where an inference satisfies the reasonable-doubt standard, as in the present case, there will certainly be a rational connection between the fact presumed or inferred (in this case, knowledge) and the facts the Government must prove in order to shift the burden of going forward (possession of recently stolen property).

We do not decide today whether a judge-formulated inference of less antiquity or authority may properly be emphasized by a jury instruction.

[12] Nor can the instruction "be fairly understood as a comment on the petitioner's failure to testify." *United States* v. *Gainey*, 380 U. S., at 70–71.

evidence independent of petitioner's testimony. Introduction of any evidence, direct or circumstantial, tending to implicate the defendant in the alleged crime increases the pressure on him to testify. The mere massing of evidence against a defendant cannot be regarded as a violation of his privilege against self-incrimination. *Yee Hem* v. *United States, supra,* at 185.

III

Petitioner further challenges his conviction on the ground that there was insufficient evidence that he knew the checks were stolen *from the mails.* He contends that 18 U. S. C. § 1708 [13] requires knowledge not only that the checks were stolen, but specifically that they were stolen from the mails. The legislative history of the statute conclusively refutes this argument [14] and the courts of appeals that have addressed the issue have uniformly interpreted the statute to require only knowledge that the property was stolen.[15]

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[13] "Whoever . . . unlawfully has in his possession, any . . . mail . . . which has been so stolen . . . , knowing the same to have been stolen, . . . [shall be fined or imprisoned or both]."

[14] Prior to 1939 the statute required proof of possession of articles stolen from the mail "knowing the same to have been *so* stolen." 18 U. S. C. § 317 (1934 ed.) (emphasis added). See, *e. g., Brandenburg* v. *United States,* 78 F. 2d 811 (CA3 1935). In 1939 Congress eliminated the word "so" preceding the word "stolen." H. R. Rep. No. 734, 76th Cong., 1st Sess., 1 (1939), explains the change: "The reported bill amends the existing law so that it will sustain a conviction for the Government to prove that the property was in fact stolen from the mails and that the defendant knew the property he received had been stolen. The committee feel that this should be sufficient without requiring the Government to prove also that the defendant knew the property received had been stolen from the mails."

See also S. Rep. No. 864, 76th Cong., 1st Sess (1939).

[15] *United States* v. *Hines,* 256 F. 2d 561 (CA2 1958); *Smith* v. *United States,* 343 F. 2d 539 (CA5), cert. denied, 382 U. S. 861

Since we find that the statute was correctly interpreted and that the trial court's instructions on the inference to be drawn from unexplained possession of stolen property were fully consistent with petitioner's constitutional rights, it is unnecessary to consider petitioner's challenges to his conviction on the forging and uttering counts.[16]

Affirmed.

MR. JUSTICE DOUGLAS, dissenting.

Possession of stolen property is traditionally under our federal system a local law question. It becomes a federal concern in the present case only if the "mail" was implicated. The indictment, insofar as the unlawful possession counts are concerned, charges that the items had been *"stolen from the mail."* While there was evidence that these items had gone through the mail, petitioner did not take the stand, nor was there any evidence that petitioner knew that the items had been "stolen from the mail." As to the possession counts in the indictment the District Court charged the jury that "three essential elements" were required to prove the possession offenses:

> "FIRST: The act or acts of unlawfully having in one's possession the contents of a letter, namely, the United States Treasury checks as alleged;
>
> "SECOND: That the contents of the letter,

(1965); *United States* v. *Gardner*, 454 F. 2d 534 (CA9), cert. denied, 409 U. S. 867 (1972); *United States* v. *Schultz*, 462 F. 2d 622 (CA9 1972).

[16] Although affirmance of petitioner's conviction on two of the six counts carrying identical concurrent sentences does not moot the issues he raises pertaining to the remaining counts, *Benton* v. *Maryland*, 395 U. S. 784 (1969), we decline as a discretionary matter to reach these issues. Cf. *United States* v. *Romano*, 382 U. S. 136, 138 (1965).

namely, the United States Treasury checks as alleged, were stolen from the mail; and

"THIRD: That the defendant James Edward Barnes knew the contents had been stolen."

The District Court also charged the jury:

"If you should find beyond a reasonable doubt from the evidence in the case that the mail described in the indictment was stolen, and that while recently stolen the contents of said mail here, the four United States Treasury checks, were in the possession of the defendant you would ordinarily be justified in drawing from those facts the inference that the contents were possessed by the accused with knowledge that it was stolen property, unless such possession is explained by facts and circumstances in this case which are in some way consistent with the defendant's."

As noted by the Court, the Act, which originally required proof of possession of articles stolen from the mail "knowing the same to have been so stolen," 18 U. S. C. § 317 (1934 ed.), was changed by eliminating the word "so" before "stolen." H. R. Rep. No. 734, 76th Cong., 1st Sess., 1. And the Act under which petitioner was charged and convicted does not require as an ingredient of the offense that petitioner knew the property had been stolen from the mails.

That, however, is the beginning, not the end of the problem. For without a nexus with the "mails" there is no federal offense. How can we rationally say that "possession" of a stolen check allows a judge or jury to conclude that the accused knew the check was *stolen from the mails?* We held in *Tot* v. *United States,* 319 U. S. 463, that where a federal Act made it unlawful for any convicted person to possess a firearm that had

been shipped in interstate or foreign commerce, it was unconstitutional to presume that a firearm possessed by such person had been received in interstate or foreign commerce.[1] The decision was unanimous. The vice in *Tot* was that the burden is on the government in a criminal case to prove guilt beyond a reasonable doubt and that use of the presumption shifts that burden. We said: "[I]t is not permissible thus to shift the burden by arbitrarily making one fact, which has no relevance to guilt of the offense, the occasion of casting on the defendant the obligation of exculpation." *Id.*, at 469. The use of presumptions and inferences to prove an element of the crime is indeed treacherous, for it allows men to go to jail without any evidence on one essential ingredient of the offense. It thus implicates the integrity of the judicial system. We held in *In re Winship*, 397 U. S. 358, 364, that the Due Process Clause requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime . . . ." Some evidence of wrongdoing is basic and essential in the judicial system, unless the way of prosecutors be made easy by dispensing with the requirement of presumption of innocence, which is the effect of what the Court does today. In practical effect the use of these presumptions often means that the great barriers to the protection of procedural due process contained in the Bill of Rights are subtly diluted.[2]

May Congress constitutionally enact a law that says

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[1] *Tot* v. *United States* was decided in 1943, four years after the passage by Congress of the 1939 amendment to the present Act eliminating the need to prove knowledge that the property had been stolen from the mails. Had *Tot* been decided before 1939 it is inconceivable that Congress would have made the 1939 change in the present Act.

[2] Mr. Justice Black and I previously have voiced this concern. *Turner* v. *United States*, 396 U. S. 398, 425 (dissenting opinion); *United States* v. *Gainey*, 380 U. S. 63, 72, 74 (dissenting opinions).

juries can convict a defendant without any evidence at all from which an inference of guilt could be drawn? If *Thompson* v. *Louisville,* 362 U. S. 199, means anything, the answer is in the negative. The Congress is as unwarranted in telling courts what evidence is enough to convict an accused as we would be to tell Congress what criminal laws should be enacted. That seems inescapably plain by the regime of separation of powers under which we live.

In *Leary* v. *United States,* 395 U. S. 6, we held that it was constitutionally impermissible to presume that one who possessed marihuana would be presumed to know of its unlawful importation. We said it would be sheer "speculation" to conclude that even a majority of the users of the plant knew the source of it. *Id.,* at 53. The overall test, we said, was whether it can be said "with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Id.,* at 36.

In that case there were some statistics as to the quantity of marihuana grown here and the amount grown abroad that enters the country. There was evidence of the characteristics of local and foreign marihuana, and the like.

Stolen checks may be the product of local burglaries of private homes or offices.

Stolen checks may come from purses snatched or purloined.

Stolen checks may involve any one of numerous artifices or tricks.

In other words, there are various sources of stolen checks which in no way implicate federal jurisdiction.

Checks stolen from national banks, checks stolen from federal agencies, checks lifted from the mails are other sources.

But, unlike *Leary*, we have no evidence whatsoever showing what amount of stolen property, let alone stolen checks, *implicates the mails*. Without some evidence or statistics of that nature we have no way of assessing the likelihood that this petitioner knew that these checks were *stolen from the mails*. We can take judicial notice that checks are stolen from the mails. But it would take a large degree of assumed omniscience to say with "substantial assurance" that this petitioner more likely than not knew from the realities of the underworld that this stolen property came *from the mails*. But without evidence of that knowledge there would be no federal offense of the kind charged.

The step we take today will be applauded by prosecutors, as it makes their way easy. But the Bill of Rights was designed to make the job of the prosecutor difficult. There is a presumption of innocence. Proof beyond a reasonable doubt is necessary. The jury, not the court, is the factfinder. These basic principles make the use of these easy presumptions dangerous.[3] What we do today is, I think, extremely disrespectful of the constitutional regime that controls the dispensation of criminal justice.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

Petitioner was charged in two counts of a six-count indictment with possession of United States Treasury

[3] What we said in *Christoffel* v. *United States*, 338 U. S. 84, 89, that "all the elements of the crime charged shall be proved beyond a reasonable doubt" has been the guiding rule at least on the issue of guilt. And it is cogently argued that presumptions of the existence of elements of a crime have no place in our constitutional framework. See 22 Stan. L. Rev. 341 (1970). That seems indubitably true to me, at least in the present case where knowledge that the checks were stolen from the mails has only suspicion to support it.

checks stolen from the mails, knowing them to be stolen. The essential elements of such an offense are (1) that the defendant was in possession of the checks, (2) that the checks were stolen from the mails, and (3) that the defendant knew that the checks were stolen. The Government proved that petitioner had been in possession of the checks and that the checks had been stolen from the mails; and, in addition, the Government introduced some evidence intended to show that petitioner knew or should have known that the checks were stolen. But rather than leaving the jury to determine the element of "knowledge" on the basis of that evidence, the trial court instructed it that it was free to infer the essential element of "knowledge" from petitioner's unexplained possession of the checks. In my view, that instruction violated the Due Process Clause of the Fifth Amendment because it permitted the jury to convict even though the actual evidence bearing on "knowledge" may have been insufficient to establish guilt beyond a reasonable doubt. I therefore dissent.

We held in *In re Winship,* 397 U. S. 358, 364 (1970), that the Due Process Clause requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime . . . ." Thus, in *Turner* v. *United States,* 396 U. S. 398, 417 (1970), we approved the inference of "knowledge" from the fact of possessing smuggled heroin because " '[c]ommon sense' . . . tells us that those who traffic in heroin will *inevitably* become aware that the product they deal in is smuggled . . . ." (Emphasis added.) The basis of that "common sense" judgment was, of course, the indisputable fact that all or virtually all heroin in this country is necessarily smuggled. Here, however, it cannot be said that all or virtually all endorsed United States Treasury checks have been stolen. Indeed, it is neither unlawful nor unusual

for people to use such checks as direct payment for goods and services. Thus, unlike *Turner*, "common sense" simply will not permit the inference that the possessor of stolen Treasury checks *"inevitably"* knew that the checks were stolen. Cf. *Leary* v. *United States*, 395 U. S. 6 (1969).

In short, the practical effect of the challenged instruction was to permit the jury to convict petitioner even if it found insufficient or disbelieved all of the Government's evidence bearing directly on the issue of "knowledge." By authorizing the jury to rely exclusively on the inference in determining the element of "knowledge," the instruction relieved the Government of the burden of proving that element beyond a reasonable doubt. The instruction thereby violated the principle of *Winship* that every essential element of the crime must be proved beyond a reasonable doubt.

Reporter's Note

The next page is purposely numbered 901. The numbers between 854 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM MAY 17 THROUGH JUNE 19, 1973

MAY 17, 1973

Dismissal Under Rule 60

No. 72–6442. KING, AKA RAVELLI *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS. Motion for leave to file petition for writ of mandamus dismissed under Rule 60 of the Rules of this Court.

MAY 21, 1973

Affirmed on Appeal

No. 72–1105. STEPHENS TRUCK LINE, INC., ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. E. D. Tenn.

No. 72–1215. DIAMOND ET AL. *v.* UNITED STATES ET AL. Appeal from D. C. D. C. Motion to dispense with printing jurisdictional statement granted. Judgment affirmed. MR. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: 354 F. Supp. 1021.

No. 72–1342. KAPLAN ET AL. *v.* MILLIKEN, JUDGE, ET AL. Affirmed on appeal from D. C. W. D. Ky. For the reasons stated in their dissent in *Wells* v. *Edwards,* 409 U. S. 1095 (1973), MR. JUSTICE WHITE and MR. JUSTICE MARSHALL would note probable jurisdiction and give plenary consideration to this case.

Appeals Dismissed

No. 72–1313. SILVERTON *v.* CALIFORNIA. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question.

No. 72–6197. SHOEMAKER *v.* DWYER ET AL. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Vacated and Remanded on Appeal

No. 70–42. ROSEN *v.* LOUISIANA STATE BOARD OF MEDICAL EXAMINERS. Appeal from D. C. E. D. La. Judgment vacated and case remanded for further consideration in light of *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Doe* v. *Bolton*, 410 U. S. 179 (1973). Reported below: 318 F. Supp. 1217.

Certiorari Granted—Vacated and Remanded

No. 71–939. JOINER ET AL. *v.* CITY OF DALLAS, TEXAS, ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mitchum* v. *Foster*, 407 U. S. 225 (1972); *Lynch* v. *Household Finance Corp.*, 405 U. S. 538 (1972); and *Younger* v. *Harris*, 401 U. S. 37 (1971). Reported below: 447 F. 2d 1403.

No. 72–6241. WEBB *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* granted. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari granted. Upon representation of the Solicitor General as set forth in his memorandum for the United States filed April 24, 1973, judgment vacated and case remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of the position presently asserted by the Government. Reported below: 466 F. 2d 190.

Certiorari Dismissed

No. 72–498. TINDER *v.* VIRGINIA. Corp. Ct., Norfolk, Va. It appearing that petitioner, a defendant in

a state criminal proceeding, died on March 17, 1973, petition for writ of certiorari dismissed. *Gersewitz* v. *New York*, 326 U. S. 687 (1945).

Miscellaneous Orders

No. 61, Orig. PETERSEN *v.* SPILIOTOPOULOS. Motion of plaintiff for leave to proceed *in forma pauperis* granted. Motion for leave to file bill of complaint denied.

No. A–1069. APPLEGATE ET AL. *v.* NEW JERSEY. Super. Ct. N. J. Application for stay of judgment, presented to MR. JUSTICE DOUGLAS and by him referred to the Court, denied.

No. A–1118. MICELI ET AL. *v.* UNITED STATES ET AL. C. A. 6th Cir. Application for stay of mandate, presented to MR. JUSTICE STEWART and by him referred to the Court, denied. MR. JUSTICE DOUGLAS would grant the stay. Reported below: 474 F. 2d 1234.

No. A–1123. REID *v.* MARQUETTE UNIVERSITY ET AL. C. A. 7th Cir. Application for stay of mandate, presented to MR. JUSTICE DOUGLAS and by him referred to the Court, denied.

No. A–1136. GREENSPHAN *v.* UNITED STATES. C. A. 7th Cir. Application for recall of mandate, presented to MR. JUSTICE DOUGLAS and by him referred to the Court, denied. Reported below: 477 F. 2d 508.

No. 72–586. CADY, WARDEN *v.* DOMBROWSKI. C. A. 7th Cir. [Certiorari granted, 409 U. S. 1059.] Motion of the State of Florida for leave to file a brief as *amicus curiae* in support of petitioner, after argument, granted.

No. 72–782. GATEWAY COAL CO. *v.* UNITED MINE WORKERS OF AMERICA ET AL. C. A. 3d Cir. [Certiorari granted, 410 U. S. 953.] Motion of National Association of Manufacturers for leave to file a brief as *amicus curiae* in support of petitioner granted.

No. 72–812. STORER ET AL. *v.* BROWN, SECRETARY OF STATE OF CALIFORNIA, ET AL.; and

No. 72–6050. FROMMHAGEN *v.* BROWN, SECRETARY OF STATE OF CALIFORNIA, ET AL. Appeals from D. C. N. D. Cal. [Probable jurisdiction noted, 410 U. S. 965.] Motion of appellants in No. 72–812 for divided argument granted. It is ordered that Paul N. Halvonik, Esquire, and Joseph Remcho, Esquire, be permitted to present oral argument in the consolidated cases. Motion of appellant in No. 72–6050 to argue orally *pro se* denied.

No. 72–822. RENEGOTIATION BOARD *v.* BANNERCRAFT CLOTHING CO., INC., ET AL. C. A. D. C. Cir. [Certiorari granted, 410 U. S. 907.] Motion of respondents to permit two counsel to argue orally granted.

No. 72–887. AMERICAN PARTY OF TEXAS ET AL. *v.* WHITE, SECRETARY OF STATE OF TEXAS. Appeal from D. C. W. D. Tex. [Probable jurisdiction noted, *sub nom. American Party of Texas* v. *Bullock*, 410 U. S. 965.] Motion of appellant Dunn for leave to proceed further herein *in forma pauperis* granted only to the extent that a typewritten brief may be filed.

No. 72–1148. CUPP, PENITENTIARY SUPERINTENDENT *v.* NAUGHTEN. C. A. 9th Cir. [Certiorari granted, 411 U. S. 947.] Motion of respondent for appointment of counsel granted. It is ordered that Ross R. Runkel, Esquire, of Salem, Oregon, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for respondent in this case.

No. 72–6575. JOHNSON *v.* WYOMING ET AL.;

No. 72–6578. LODDY *v.* MEACHAM ET AL.; and

No. 72–6601. HAWKINS *v.* WYOMING ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 72–6432. SPROUSE *v.* UNITED STATES. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 72–1254. SMITH, SHERIFF *v.* GOGUEN. Appeal from C. A. 1st Cir. Probable jurisdiction noted. Reported below: 471 F. 2d 88.

Certiorari Granted

No. 72–1319. UNITED STATES *v.* CHAVEZ ET AL. C. A. 9th Cir. Motion of respondent George Apodaca for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 478 F. 2d 512.

Certiorari Denied. (See also No. 72–6197, *supra.*)

No. 72–1097. BURKS ET AL. *v.* PERK, MAYOR OF CLEVELAND, OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 470 F. 2d 163.

No. 72–1153. BRICK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 72–1200. LINDSEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 473 F. 2d 910.

No. 72–1211. MENDOZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–1222. COPE ET AL. *v.* ALLSTATE INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 693.

No. 72–1224. TERESI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–1239. OLSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 473 F. 2d 686.

No. 72–1250. HAGEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 470 F. 2d 110.

No. 72–1265. SIMAS BROS. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied.

No. 72–1298. COMMISSIONER OF INTERNAL REVENUE *v.* MORITZ. C. A. 10th Cir. Certiorari denied. Reported below: 469 F. 2d 466.

No. 72–1312. AOSSEY *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 201 N. W. 2d 731.

No. 72–1314. SNITOFF *v.* BOARD OF MANAGERS OF CHICAGO BAR ASSN. Sup. Ct. Ill. Certiorari denied. Reported below: 53 Ill. 2d 50, 289 N. E. 2d 428.

No. 72–1335. MOORE *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 108 Ariz. 532, 502 P. 2d 1351.

No. 72–1336. KEARNEY *v.* DISTRICT OF COLUMBIA. Super. Ct. D. C. Certiorari denied.

No. 72–1337. W. J. JONES & SON, INC. *v.* WEYERHAEUSER CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 471 F. 2d 369.

No. 72–1358. O'MEARA ET AL. *v.* MCDONALD. C. A. 5th Cir. Certiorari denied. Reported below: 473 F. 2d 799.

No. 72–6152. MIXEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 469 F. 2d 203.

No. 72–6189. HENSLEY *v.* HARDY. C. A. 5th Cir. Certiorari denied.

No. 72–6291. CONNORS *v.* HARRISON, CORRECTIONS DIRECTOR, ET AL. C. A. 6th Cir. Certiorari denied.

No. 72–6332. ARGO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 473 F. 2d 1315.

No. 72–6335. DENMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6353. DiMario *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 473 F. 2d 1046.

No. 72–6366. DeBetham *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 470 F. 2d 1367.

No. 72–6367. Mandina *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 472 F. 2d 1110.

No. 72–6368. Butler *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 471 F. 2d 648.

No. 72–6373. Hauff *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 473 F. 2d 1350.

No. 72–6376. Miles *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 472 F. 2d 1145.

No. 72–6457. Washington *v.* Maryland. C. A. 4th Cir. Certiorari denied.

No. 72–6458. O'Shea *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 472 F. 2d 1406.

No. 72–6461. Canty *v.* Board of Education of the City of New York. C. A. 2d Cir. Certiorari denied. Reported below: 470 F. 2d 1111.

No. 72–6462. Thompson *v.* Lambert's Point Docks, Inc., et al. C. A. 4th Cir. Certiorari denied.

No. 72–6465. Sander *v.* Ohio. Ct. App. Ohio, Darke County. Certiorari denied.

No. 72–6474. O'Neill *v.* Superior Court of Alameda County. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 72–6487. Rivera *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 7 Ill. App. 3d 983, 289 N. E. 2d 36.

No. 72–6493. BONAFINI *v.* NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied.

No. 72–6494. FARESE ET UX. *v.* HOME SAVINGS & LOAN ASSN. ET AL. C. A. 9th Cir. Certiorari denied.

No. 72–6496. GERMAN *v.* FLORIDA ET AL. Sup. Ct. Fla. Certiorari denied.

No. 72–6501. RICHARDSON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 472 F. 2d 169.

No. 72–6502. LAYMAN *v.* TOLLETT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 72–6508. MITCHELL *v.* CONBOY, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 72–1064. BARTON, REFORMATORY SUPERINTENDENT *v.* TABASKO. C. A. 6th Cir. Motion to dispense with printing petition and motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 472 F. 2d 871.

No. 72–1209. HANLY ET AL. *v.* KLEINDIENST, ATTORNEY GENERAL, ET AL. C. A. 2d Cir. Application for stay presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 471 F. 2d 823.

No. 72–1232. WILLIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 473 F. 2d 450.

No. 72–1311. CALIFORNIA *v.* FRITO-LAY, INC., ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 474 F. 2d 774.

No. 72–6201. ELDRIDGE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 31 N. Y. 2d 820, 291 N. E. 2d 719.

No. 72–6287. ROSENTHAL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 470 F. 2d 837.

No. 72–1331. ALLEN ET AL. *v.* CITY OF MOBILE ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 466 F. 2d 122.

No. 72–1349. FREEMAN *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA (BAY FARM ISLAND RECLAMATION DISTRICT No. 2105 ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 1st App. Dist. Motion to dispense with printing petition granted. Certiorari denied.

No. 72–6075. BLAND *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 153 U. S. App. D. C. 254, 472 F. 2d 1329.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

Petitioner was 16 years old at the time of his arrest and at the time of his indictment for armed robbery of a post office. He was charged as an adult under D. C. Code Ann. § 16–2301 (3)(A) (Supp. V, 1972).* He

*That section reads:

"(3) The term 'child' means an individual who is under 18 years of age, except that the term 'child' does not include an individual who is sixteen years of age or older and—

"(A) charged by the United States attorney with (i) murder, forcible rape, burglary in the first degree, robbery while armed, or assault with intent to commit any such offense, or (ii) an offense listed in clause (i) and any other offense properly joinable with such an offense."

moved to dismiss the indictment, alleging that the statutory basis for prosecuting him as an adult failed to provide him with procedural due process. The District Court dismissed the indictment, 330 F. Supp. 34, and the Court of Appeals by a divided vote reversed that judgment, 153 U. S. App. D. C. 254, 472 F. 2d 1329.

Under the statute of the District of Columbia involved in *Kent* v. *United States,* 383 U. S. 541, a juvenile, age 16 or older, who was charged with a felony, might be held for trial as though he were an adult, if the Juvenile Court waived jurisdiction. *Kent* held that the Act, read in light of "the essentials of due process and fair treatment," *id.,* at 562 and 557, required a hearing on whether the Juvenile Court should waive its exclusive jurisdiction over the juvenile and transfer him to the criminal court of the District. And in *In re Gault,* 387 U. S. 1, we held that where under a state juvenile court act a juvenile is declared "delinquent" and either confined or held for regular criminal prosecution, there must be a due process hearing on the issue of "delinquency."

The District of Columbia Act was modified after *Kent* so as to give the U. S. Attorney the power to remove a juvenile from the statutory category of "child" merely by charging him with a designated felony. The House Report No. 91–907, p. 50, explains the reason for the change:

> "Because of the great increase in the number of serious felonies committed by juveniles and because of the substantial difficulties in transferring juvenile offenders charged with serious felonies to the jurisdiction of the adult court under present law, provisions are made in this subchapter for a better mechanism for separation of the violent youthful offender and recidivist from the rest of the juvenile community."

The "substantial difficulties" are obviously the constitutional rights explicated in *Kent* and in *Gault*. The "better mechanism" is the use of the shortcut employed, *viz.*, the discretion of the prosecutor. Two rather large questions are presented and they seem to me to be substantial.

First. A juvenile or "child" is placed in a more protected position than an adult, not by the Constitution, but by an Act of Congress. In that category he is theoretically subject to rehabilitative treatment. Can he, on the whim or caprice of a prosecutor, be put in the class of the run-of-the-mill criminal defendants, without any hearing, without any chance to be heard, without an opportunity to rebut the evidence against him, without a chance of showing that he is being given an invidiously different treatment from others in his group? *Kent* and *Gault* suggest that those are very substantial constitutional questions.

Second. The barricade behind which the prosecutor operates is that this, like other prosecutions, is committed to his informed discretion, which is beyond the reach of judicial intrusion. Mr. Justice Black and I said, in dissent in *Berra* v. *United States*, 351 U. S. 131, at 140:

> "[I]t is true that under our system Congress may vest the judge and jury with broad power to say how much punishment shall be imposed for a particular offense. But it is quite different to vest such powers in a prosecuting attorney. A judge and jury act under procedural rules carefully prescribed to protect the liberty of the individual. Their judgments and verdicts are reached after a public trial in which a defendant has the right to be represented by an attorney. No such protections are thrown around decisions by a prosecuting attorney. Substitution of the prosecutor's caprice for

> the adjudicatory process is an action I am not willing to attribute to Congress in the absence of clear command. Our system of justice rests on the conception of impersonality in the criminal law."

The Administrative Procedure Act, 5 U. S. C. § 701 *et seq.*, gives the courts power to review "agency action" and to hold it unlawful, if found to be "contrary to constitutional right, power, privilege, or immunity." § 706 (2)(B). This arguably is broad enough to reach the exercise of a prosecutor's discretion in a way that violates the standards of due process laid down in *Kent* and in *Gault*.

One needs no reminder that government too can be lawless, that government cannot lead the way in law and order when it is the great malefactor. The Administrative Procedure Act is indeed part of the citizen's arsenal against lawless government. As Professor Kenneth Davis said in Discretionary Justice 210 (1969): "Under the Administrative Procedure Act judicial review of the exercise of executive discretion is the rule and unreviewability is the exception."

Respecting "the settled judicial tradition" not to interfere with the prosecuting function, Professor Davis says:

> "Is it because the tradition became settled during the nineteenth century when courts were generally assuming that judicial intrusion into any administration would be unfortunate? Is it because the tradition became settled while the Supreme Court was actuated by its 1840 remark that 'The interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief'? Is it because the tradition became settled before the courts made the twentieth-century discovery that the courts can interfere with executive

action to protect against abuses but at the same time can avoid taking over the executive function? Is it because the tradition became settled before the successes of the modern system of *limited* judicial review became fully recognized?

"On the basis of what the courts know today about leaving administration to administrators but at the same time providing an effective check to protect against abuses, should the courts not take a fresh look at the tradition that prevents them from reviewing the prosecuting function? Throughout the governmental system, courts have found that other administrative or executive functions are in need of a judicial check, with a limited scope of review. *The reasons for a judicial check of prosecutors' discretion are stronger than for such a check of other administrative discretion that is now traditionally reviewable.* Important interests are at stake. Abuses are common. The questions involved are appropriate for judicial determination. And much injustice could be corrected." *Id.*, at 211–212.

These two questions are large questions and substantial ones. I would grant the petition for certiorari in order to resolve them.

No. 72–6491. BECKNER *v.* SEARS, ROEBUCK & CO. ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

Rehearing Denied

No. 71–1097. YUMICH ET AL. *v.* CITY OF CHICAGO, 410 U. S. 908;

No. 72–1025. B. P. O. E. LODGE No. 2043 OF BRUNSWICK ET AL. *v.* INGRAHAM ET AL., 411 U. S. 924; and

No. 72–1087. CARD *v.* UNITED STATES, 411 U. S. 917. Petitions for rehearing denied.

No. 72–1114. HUTTER ET UX. *v.* KORZEN, 411 U. S. 912;

No. 72–1134. REIBERT ET AL. *v.* ATLANTIC RICHFIELD CO. ET AL., 411 U. S. 938;

No. 72–6040. FAYNE *v.* BERG, 410 U. S. 969;

No. 72–6052. LANDRY *v.* UNITED STATES, 411 U. S. 918; and

No. 72–6318. LANDES *v.* PAGEANT-POSEIDON, LTD., 411 U. S. 950. Petitions for rehearing denied.

No. 71–1270. MCKEE *v.* UNITED STATES, 407 U. S. 910, 409 U. S. 899 and 1019. Motion for leave to dispense with printing petition granted. Motion for leave to file third petition for rehearing denied.

No. 72–5175. MEYER *v.* WEIL ET AL., 409 U. S. 1060. Motion for leave to file petition for rehearing denied.

MAY 29, 1973

Affirmed on Appeal

No. 72–287. MILLER, COMMISSIONER OF MENTAL HYGIENE OF NEW YORK, ET AL. *v.* GOMEZ ET AL.; and

No. 72–5272. DEMUNDO ET AL. *v.* MILLER, COMMISSIONER OF MENTAL HYGIENE OF NEW YORK, ET AL. Appeals from D. C. S. D. N. Y. Motion of appellees for leave to proceed *in forma pauperis* in No. 72–287 granted. Judgment affirmed. Reported below: 341 F. Supp. 323.

No. 72–6344. BELL ET AL. *v.* HEIM, EXECUTIVE DIRECTOR, NEW MEXICO HEALTH AND SOCIAL SERVICES DEPARTMENT, ET AL. Affirmed on appeal from D. C. N. M.

Vacated and Remanded on Appeal

No. 72–1302. EDELMAN, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS *v.* TOWNSEND ET AL. Appeal from D. C. N. D. Ill. Motions of appellees Alexander

and Hucher for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded so that District Court may enter a fresh judgment from which a timely appeal may be taken to the Court of Appeals. Reported below: 345 F. Supp. 666.

Appeals Dismissed

No. 72–1338. GIANT OF MARYLAND, INC. *v.* STATE'S ATTORNEY FOR PRINCE GEORGES COUNTY. Appeal from Ct. App. Md. dismissed for want of substantial federal question. Reported below: 267 Md. 501, 298 A. 2d 427.

No. 72–1365. LILLIAN B. A. *v.* ARTHUR O. S. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question.

No. 72–6506. SMITH *v.* CALIFORNIA. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question.

No. 72–5924. KING *v.* WEST VIRGINIA. Appeal from Cir. Ct. W. Va., Marion County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 72–6412. QUINN *v.* UNITED STATES. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 72–6047. LAURSEN *v.* CALIFORNIA. Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 8 Cal. 3d 192, 501 P. 2d 1145.

Certiorari Granted—Vacated and Remanded

No. 72–780. CALIFORNIA ADULT AUTHORITY ET AL. *v.* GRIFFIN ET AL.; and

No. 72–5770. M'CLARY *v.* CALIFORNIA ADULT AUTHORITY ET AL. C. A. 9th Cir. Motion of respondents in No. 72–780 and of petitioner in No. 72–5770 for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated and cases remanded for further consideration in light of *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973). Reported below: No. 72–780, 464 F. 2d 585 and 602; No. 72–5770, 466 F. 2d 1122.

No. 72–5398. GARDNER *v.* MCCARTHY, FACILITY SUPERINTENDENT. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Gagnon* v. *Scarpelli*, 411 U. S. 778 (1973).

Miscellaneous Orders

No. A–1137. SMITH *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of mandate, presented to MR. JUSTICE DOUGLAS and by him referred to the Court, denied. Reported below: 491 S. W. 2d 924.

No. A–1164. MARBURGER, COMMISSIONER OF EDUCATION OF NEW JERSEY, ET AL. *v.* PUBLIC FUNDS FOR PUBLIC SCHOOLS OF NEW JERSEY ET AL. D. C. N. J. Application for stay of preliminary injunction, presented to MR. JUSTICE BRENNAN and by him referred to the Court, granted pending further order of this Court. Reported below: 358 F. Supp. 29.

No. A–1173. RUDERER *v.* UNITED STATES ET AL. Applications for immediate equitable and all other relief, presented to MR. JUSTICE REHNQUIST and by him referred to the Court, denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of these applications.

No. 72–782. GATEWAY COAL CO. *v.* UNITED MINE WORKERS OF AMERICA ET AL. C. A. 3d Cir. [Certiorari granted, 410 U. S. 953.] Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* in support of petitioner granted.

No. 72–1118. PHILLIPS, ACTING DIRECTOR, OFFICE OF ECONOMIC OPPORTUNITY, ET AL. *v.* KENNEDY ET AL. Appeal from D. C. N. D. Ill. [Probable jurisdiction noted, 411 U. S. 915.] Motion of Michael Kaye for leave to intervene and to file a brief on the merits denied.

No. 72–6773. SHAVER *v.* SANDELL ET AL. Justice Court, East Phoenix Precinct No. 2, Maricopa County, Arizona. Motion of petitioner to expedite denied.

No. 72–6551. LEWIS *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 72–6553. DIXON *v.* YOUNG, U. S. DISTRICT JUDGE. Motion of petitioner to add Harry Friberg et al. as parties respondent granted. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 72–1180. OLD DOMINION BRANCH No. 496, NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL–CIO, ET AL. *v.* AUSTIN ET AL. Appeal from Sup. Ct. Va. Probable jurisdiction noted and case set for oral argument with No. 72–617 [*Gertz* v. *Robert Welch, Inc.*, certiorari granted, 410 U. S. 925]. Reported below: 213 Va. 377, 192 S. E. 2d 737.

Certiorari Granted

No. 72–1355. UNITED STATES *v.* MATLOCK. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma*

pauperis and certiorari granted. Reported below: 476 F. 2d 1083.

Certiorari Denied. (See also Nos. 72–5924, 72–6412, and 72–6047, *supra.*)

No. 72–304. HOWARD, WARDEN *v.* HEMPHILL. C. A. 6th Cir. Certiorari denied.

No. 72–679. UNITED MINE WORKERS OF AMERICA ET AL. *v.* YABLONSKI ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 151 U. S. App. D. C. 253, 466 F. 2d 424.

No. 72–1059. SCREEN EXTRAS GUILD *v.* KERR. C. A. 9th Cir. Certiorari denied. Reported below: 466 F. 2d 1267 and 1271.

No. 72–1119. GOLDEN GRAIN MACARONI CO. *v.* FEDERAL TRADE COMMISSION. C.A. 9th Cir. Certiorari denied. Reported below: 472 F. 2d 882.

No. 72–1165. KAPRELIAN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 6 Ill. App. 3d 1066, 286 N. E. 2d 613.

No. 72–1181. PRIM *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 53 Ill. 2d 62, 289 N. E. 2d 601.

No. 72–1183. GIANONE ET AL., DBA GIANONE'S STEAK HOUSE *v.* ALCOHOLIC BEVERAGE CONTROL BOARD OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 72–1268. WILLIAMS *v.* AETNA LIFE & CASUALTY CO. C. A. 5th Cir. Certiorari denied. Reported below: 468 F. 2d 952.

No. 72–1271. BRUMBAUGH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 471 F. 2d 1128.

No. 72–1281. ESSEX, ADMINISTRATRIX *v.* WALTERS, COMMISSIONER OF INTERNAL REVENUE, ET AL. C. A. 8th Cir. Certiorari denied.

No. 72–1295. CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE *v.* GILSTRAP, COLLECTOR OF REVENUE OF MISSOURI, ET AL. Sup. Ct. Mo. Certiorari denied. Reported below: 503 S. W. 2d 1.

No. 72–1299. GARRIS *v.* UNITED STATES;
No. 72–6389. WILHELM *v.* UNITED STATES; and
No. 72–6429. TERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 473 F. 2d 909.

No. 72–1332. LOEVSKY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 471 F. 2d 1178.

No. 72–1344. CALIFORNIA *v.* KRIVDA ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 8 Cal. 3d 623, 504 P. 2d 457.

No. 72–1347. LOMBARDI *v.* TAURO ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 470 F. 2d 798.

No. 72–1352. IN RE BAKER. C. A. 9th Cir. Certiorari denied.

No. 72–1357. WESTERN DEALER MANAGEMENT, INC. *v.* ENGLAND, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. Reported below: 473 F. 2d 262.

No. 72–1364. WESTROADS, INC. *v.* PEDERSEN ET AL. Sup. Ct. Neb. Certiorari denied. Reported below: 189 Neb. 236, 202 N. W. 2d 198.

No. 72–1372. DAILEY *v.* LISZKA, AKA GREENE. C. A. 4th Cir. Certiorari denied. Reported below: 473 F. 2d 906.

No. 72–1373. TRIMBLE *v.* TEXAS STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS. Ct. Civ. App. Tex., 8th Sup. Jud. Dist. Certiorari denied. Reported below: 483 S. W. 2d 275.

No. 72–1376. PERMIAN CORP. ET AL. *v.* COFFEE. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 1040.

No. 72–5709. MARTINEZ *v.* ALLDREDGE. C. A. 3d Cir. Certiorari denied. Reported below: 468 F. 2d 684.

No. 72–6203. HALL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–6224. BERKLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 471 F. 2d 655.

No. 72–6230. MARTIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 72–6244. ESCOBAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–6295. BOYSAW *v.* OHIO. Ct. App. Ohio, Ashtabula County. Certiorari denied.

No. 72–6309. LARSEN *v.* PROCUNIER, CORRECTIONS DIRECTOR, ET AL. C. A. 9th Cir. Certiorari denied.

No. 72–6315. RODRIGUES *v.* DAGGET, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 72–6324. O'DELL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: See 8 Ill. App. 3d 203, 289 N. E. 2d 686.

No. 72–6336. JACOBS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 473 F. 2d 461.

No. 72–6351. STUDT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 72–6357. MAXWELL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 297 A. 2d 771.

No. 72–6363. MATNEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 472 F. 2d 704.

No. 72–6370. RANCE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 72–6375. STANSEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 473 F. 2d 1045.

No. 72–6384. O'CLAIR *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 470 F. 2d 1199.

No. 72–6386. BETANCOURT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–6392. WHEELER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 72–6393. ALVAREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 472 F. 2d 111.

No. 72–6394. BRIGHT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 471 F. 2d 723.

No. 72–6395. KACZYNSKI *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied.

No. 72–6404. FISCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 474 F. 2d 1071.

No. 72–6405. HEARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 72–6408. BURNS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 72–6415. DUCKWORTH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 72–6420. TATE *v.* BLACKWELL, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 72–6516. REARDON *v.* MEACHAM, PENITENTIARY SUPERINTENDENT. C. A. 10th Cir. Certiorari denied.

No. 72–6517. DAVID *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 473 F. 2d 906.

No. 72–6521. BRYANT ET AL. *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 49 Ala. App. 359, 272 So. 2d 286.

No. 72–6525. LEE *v.* BLACKLEDGE, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 72–6536. REESE *v.* MARSINO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 72–6545. POTTER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–1207. BRANDYWINE-MAIN LINE RADIO, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 153 U. S. App. D. C. 305, 473 F. 2d 16.

No. 72–1212. COUNTY OF NASSAU ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 470 F. 2d 675.

No. 72–1367. RHINEHART *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6308. SANDERS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: See 6 Ill. App. 3d 820, 286 N. E. 2d 785.

No. 72–6528. SOLOMON *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 489 S. W. 2d 547.

No. 72–6541. SULLIVAN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 450 Pa. 273, 299 A. 2d 608.

No. 72–1341. PLACID OIL CO. ET AL. *v.* MCILWAIN ET AL. C. A. 5th Cir. Motion of respondent McIlwain for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 472 F. 2d 248.

No. 72–1343. LENNY *v.* MELLODY ET AL. Pa. Commw. Ct. Motion to dispense with printing petition granted. Certiorari denied.

No. 72–1353. CORPORACION DEL COBRE ET AL. *v.* ANACONDA CO. ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition.

No. 72–1375. HOBART BROTHERS CO. *v.* MALCOLM T. GILLILAND, INC. C. A. 5th Cir. Motion of Ohio Manufacturers Assn. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 471 F. 2d 894.

Rehearing Denied

No. 72–871. SILVERS *v.* DOWLING, JUDGE, ET AL., 411 U. S. 944;

No. 72–5961. KELLY *v.* UNITED STATES, 411 U. S. 933; and

No. 72–6264. KRIKMANIS *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL., 411 U. S. 937. Petitions for rehearing denied.

No. 72–6273. BOYD *v.* NEW MEXICO, 411 U. S. 937; and

No. 72–6409. HAWKINS *v.* HAWKINS, 411 U. S. 971. Petitions for rehearing denied.

No. 71–6873. NEELY *v.* FIELD, U. S. DISTRICT JUDGE, ET AL., 409 U. S. 871, 1050, and 410 U. S. 917. Motion for leave to file third petition for rehearing denied.

No. 72–1294. WASHINGTON KELPERS ASSN. *v.* WASHINGTON ET AL., 411 U. S. 982. Motion to dispense with printing petition for rehearing granted. Petition for rehearing denied.

JUNE 4, 1973

Affirmed on Appeal

No. 72–745. RYAN *v.* KLEIN ET AL. Affirmed on appeal from D. C. E. D. N. Y. Reported below: 347 F. Supp. 946.

No. 72–943. FISHER, COMMISSIONER, DEPARTMENT OF HEALTH AND WELFARE OF MAINE, ET AL. *v.* GRAVES ET AL. Appeal from D. C. Me. Motion of appellees for leave to proceed *in forma pauperis* granted. Judgment affirmed. Reported below: 361 F. Supp. 1356.

No. 72–1251. STANDARD OIL COMPANY OF CALIFORNIA *v.* UNITED STATES. Affirmed on appeal from D. C. N. D. Cal. MR. JUSTICE WHITE took no part in the consideration or decision of this appeal.

No. 72–1406. OLDROYD ET AL. *v.* KUGLER, ATTORNEY GENERAL OF NEW JERSEY, ET AL. Affirmed on appeal from D. C. N. J. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 352 F. Supp. 27.

No. 72–1408. CARLESON, DIRECTOR, DEPARTMENT OF SOCIAL WELFARE *v.* YEE-LITT ET AL. Appeal from D. C. N. D. Cal. Motion of appellees for leave to proceed *in*

forma pauperis granted. Judgment affirmed. Reported below: 353 F. Supp. 996.

Appeals Dismissed

No. 72–1178. STEIN *v.* HOWLETT, AUDITOR OF PUBLIC ACCOUNTS OF ILLINOIS, ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 52 Ill. 2d 570, 289 N. E. 2d 409.

No. 72–1413. ITZ ET UX. *v.* PENICK ET AL. Appeal from Sup. Ct. Texas dismissed for want of substantial federal question. Reported below: 493 S. W. 2d 506.

No. 72–1415. RICHTER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 72–1447. BLACKBURN *v.* INDIANA. Appeal from Sup. Ct. Ind. dismissed for want of substantial federal question. Reported below: —— Ind. ——, 291 N. E. 2d 686.

No. 72–6221. SAYLES *v.* ALBERT MIRMAN & ASSOCIATES, INC. Appeal from Ct. App. D. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 72–6293. GEMMILL ET AL. *v.* CALIFORNIA. Appeal from Super. Ct. Cal., Shasta County, dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument.

Vacated and Remanded on Appeal

No. 72–770. COMMISSIONER OF SOCIAL SERVICES OF NEW YORK ET AL. *v.* KLEIN ET AL.; and

No. 72–803. NASSAU COUNTY MEDICAL CENTER ET AL. *v.* KLEIN ET AL. Appeals from D. C. E. D. N. Y. Judg-

ment vacated and cases remanded for further consideration in light of *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Doe* v. *Bolton*, 410 U. S. 179 (1973). Reported below: 347 F. Supp. 496.

Certiorari Granted—Vacated and Remanded. (See No. 72–1164, *ante*, p. 427.)

Certiorari Granted—Reversed and Remanded. (See No. 72–6198, *ante*, p. 430.)

Miscellaneous Orders

No. A–1124. HENRY ET AL. *v.* WARNER, SECRETARY OF THE NAVY, ET AL. Application for order to vacate in part order of the United States Court of Appeals for the Ninth Circuit, dated May 8, 1973, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. 71–1255. UNITED STATES *v.* ASH. C. A. D. C. Cir. [Certiorari granted, 407 U. S. 909.] Motion of respondent for leave to file supplemental brief after argument granted.

No. 72–6660. BUCKLES *v.* MEACHAM, PENITENTIARY SUPERINTENDENT, ET AL.;

No. 72–6662. WARD *v.* ANDERSON, WARDEN; and

No. 72–6682. MCKINNEY *v.* CRAVEN, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 72–6537. ACARINO *v.* MISHLER, CHIEF JUDGE, U. S. DISTRICT COURT. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 72–6156. LEWIS *v.* CITY OF NEW ORLEANS. Appeal from Sup. Ct. La. Motion for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 263 La. 809, 269 So. 2d 450.

Certiorari Granted

No. 72–851. ONEIDA INDIAN NATION OF NEW YORK ET AL. *v.* COUNTY OF ONEIDA, NEW YORK, ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 464 F. 2d 916.

No. 72–1061. WINDWARD SHIPPING (LONDON), LTD., ET AL. *v.* AMERICAN RADIO ASSOCIATION, AFL–CIO, ET AL. Ct. Civ. App. Tex., 14th Sup. Jud. Dist. Certiorari granted. Reported below: 482 S. W. 2d 675.

No. 72–1371. WALTERS, COMMISSIONER OF INTERNAL REVENUE *v.* "AMERICANS UNITED" INC. C. A. D. C. Cir. Certiorari granted. Reported below: 155 U. S. App. D. C. 284, 477 F. 2d 1169.

Certiorari Denied. (See also Nos. 72–1415 and 72–6221, *supra.*)

No. 71–6416. HARRIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 453 F. 2d 1317.

No. 71–6770. FIELDS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 458 F. 2d 1194.

No. 72–267. KELLY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 465 F. 2d 147.

No. 72–1117. PROSCH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 72–1219. BALLARD *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of San Francisco. Certiorari denied.

No. 72–1243. RACHAL *v.* UNITED STATES; and

No. 72–6364. HUNNICUTT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 473 F. 2d 1338.

No. 72–1262. STANLEY WORKS *v.* FEDERAL TRADE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 469 F. 2d 498.

No. 72–1266. SEUSS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 474 F. 2d 385.

No. 72–1270. CUNDY *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: 86 S. D. 766, 201 N. W. 2d 236.

No. 72–1290. BUFALINO *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 473 F. 2d 728.

No. 72–1293. SELB MANUFACTURING CO. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 472 F. 2d 207.

No. 72–1324. GOODING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 473 F. 2d 425.

No. 72–1354. GRACI ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 472 F. 2d 124.

No. 72–1363. MONROE AUTO EQUIPMENT CO., HARTWELL DIVISION *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 470 F. 2d 1329.

No. 72–1381. UNITED STATES *v.* TINNEY. C. A. 3d Cir. Certiorari denied. Reported below: 473 F. 2d 1085.

No. 72–1384. DUMON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 488 S. W. 2d 343.

No. 72–1397. LOPEZ *v.* WASHINGTON, MAYOR OF WASHINGTON, D. C., ET AL. C. A. D. C. Cir. Certiorari denied.

No. 72–1400. CARTER-WALLACE, INC. *v.* OTTE, TRUSTEE IN BANKRUPTCY. C. A. 2d Cir. Certiorari denied. Reported below: 474 F. 2d 529.

No. 72–5496. BRUMLEY ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 466 F. 2d 911.

No. 72–5691. YOUNG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 471 F. 2d 109.

No. 72–5776. SPROSS *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 72–6288. JONES *v.* SWENSON, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 469 F. 2d 535.

No. 72–6321. ROJAS *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari denied.

No. 72–6322. MEYER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 471 F. 2d 652.

No. 72–6358. GRANGER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 475 F. 2d 1022.

No. 72–6388. MARTIN *v.* ADMINISTRATOR OF VETERANS' AFFAIRS. C. A. D. C. Cir. Certiorari denied.

No. 72–6398. ALLEN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 72–6400. BURROUGHS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 72–6402. LEMONS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 470 F. 2d 135.

No. 72–6411. TUCKER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 470 F. 2d 220.

No. 72–6418. TREXLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 369.

No. 72–6424. STROUD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 474 F. 2d 737.

No. 72–6425. WASHINGTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 471 F. 2d 402.

No. 72–6427. SMITH *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 471 F. 2d 609.

No. 72–6435. NOVAK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 475 F. 2d 180.

No. 72–6436. SAVAGE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 470 F. 2d 948.

No. 72–6440. ROWE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 72–6445. SUMIDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6450. PREZZI *v.* BERZAK ET AL. C. A. 2d Cir. Certiorari denied.

No. 72–6488. BARFIELD *v.* HARRIS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 72–6543. OLIVER *v.* SHAPP, GOVERNOR OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 72–6557. SMILEY *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 72–6558. SMILEY *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 72–6571. TANNER *v.* TWOMEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 72–6572. LICON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–6577. WHEELER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 40 App. Div. 2d 348, 340 N. Y. S. 2d 196.

No. 72–6581. DODGE *v.* JOHNSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 471 F. 2d 1249.

No. 72–6584. SCOTT *v.* ESTELLE, CORRECTIONS DIRECTOR. Ct. Crim. App. Tex. Certiorari denied.

No. 72–6590. HINSON *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 17 N. C. App. 25, 193 S. E. 2d 415.

No. 72–6603. JAYNES *v.* JAYNES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 1345.

No. 72–1108. MOBIL OIL CORP. *v.* FEDERAL POWER COMMISSION. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 469 F. 2d 130.

No. 72–1169. ENVIRONMENTAL DEFENSE FUND, INC., ET AL. *v.* CORPS OF ENGINEERS OF THE UNITED STATES ARMY ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 470 F. 2d 289.

No. 72–1247. TWO *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 471 F. 2d 287.

No. 72–1291. ATKINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 473 F. 2d 308.

No. 72–6355. MOSLEY *v.* SMITH, WARDEN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 470 F. 2d 1320.

No. 72–6391. THOMAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 474 F. 2d 110.

No. 72–6503. DRAGONETTE *v.* CITY OF EAST CLEVELAND. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 32 Ohio St. 2d 147, 290 N. E. 2d 571.

No. 72–6529. DUKE *v.* NORTH TEXAS STATE UNIVERSITY ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 469 F. 2d 829.

No. 72–6559. WILLIAMS *v.* CLINCHFIELD COAL CO. Sup. Ct. Va. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 213 Va. 445, 192 S. E. 2d 751.

No. 72–1048. CARDWELL, WARDEN *v.* WORKMAN; and No. 72–6600. WORKMAN *v.* CARDWELL, WARDEN. C. A. 6th Cir. Motion to dispense with printing petition and motion of respondent for leave to proceed *in forma pauperis* in No. 72–1048 granted. Certiorari denied. Reported below: 471 F. 2d 909.

No. 72–1279. DIAMOND *v.* UNITED STATES. C. A. 9th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 471 F. 2d 771.

No. 72–1425. UNITED STATES *v.* LEATHERS ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BLACKMUN took no part in the

consideration or decision of this petition. Reported below: 471 F. 2d 856.

No. 72–1436. UNITED TRANSPORTATION UNION LODGE 550 ET AL. *v.* ROCK ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 473 F. 2d 1344.

Rehearing Denied

No. 71–1082. ASKEW, GOVERNOR OF FLORIDA, ET AL. *v.* AMERICAN WATERWAYS OPERATORS, INC., ET AL., 411 U. S. 325;

No. 71–1545. BUTZ, SECRETARY OF AGRICULTURE, ET AL. *v.* GLOVER LIVESTOCK COMMISSION CO., INC., 411 U. S. 182; and

No. 72–6133. LANDIS *v.* UNITED STATES, 411 U. S. 935. Petitions for rehearing denied.

No. 72–5024. CAMPBELL *v.* GEORGIA ET AL., 409 U. S. 984; and

No. 72–5921. STOKES *v.* UNITED STATES POSTAL SERVICE ET AL., 410 U. S. 985. Motions for leave to file petitions for rehearing denied.

JUNE 8, 1973

Miscellaneous Order

No. A–1219. HELFANT *v.* KUGLER, ATTORNEY GENERAL OF NEW JERSEY, ET AL. Application for injunction pending disposition of appeal in the United States Court of Appeals for the Third Circuit presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application.

JUNE 11, 1973

Affirmed on Appeal

No. 72–1327. REA EXPRESS, INC. *v.* ALABAMA GREAT SOUTHERN RAILROAD CO. ET AL. Affirmed on appeal from D. C. S. D. N. Y. MR. JUSTICE POWELL took no part in the consideration or decision of this appeal Reported below: See 343 F. Supp. 851.

No. 72–1594. DIAMOND ET AL. *v.* UNITED STATES ET AL. Appeal from D. C. D. C. Motion to dispense with printing jurisdictional statement granted. Judgment affirmed. Motion for injunction denied. MR. JUSTICE POWELL took no part in the consideration or decision of this appeal and these motions.

No. 72–6725. ROSS ET AL. *v.* BROWN TITLE CORP. ET AL. Affirmed on appeal from D. C. E. D. La. MR. JUSTICE DOUGLAS dissents from affirmance. Reported below: 356 F. Supp. 595.

Appeals Dismissed

No. 72–1405. MOSES LAKE SCHOOL DISTRICT 161 ET AL. *v.* BIG BEND COMMUNITY COLLEGE, DISTRICT 18, ET AL. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. Reported below: 81 Wash. 2d 551, 503 P. 2d 86.

No. 72–1438. SMITH *v.* VIRGINIA. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question.

No. 72–6611. ANDER *v.* ANDER. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question.

No. 72–6350. MASON *v.* PANAMA CANAL CO. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a

petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS dissents from denial of petition believing that case is not moot, and would vacate judgment and remand the cause to the trial court for resolution of respondent's counterclaim. Reported below: 469 F. 2d 1120.

Certiorari Granted—Vacated and Remanded

No. 71–1245. SLAYTON, PENITENTIARY SUPERINTENDENT *v.* HAMMER. C. A. 4th Cir.;

No. 71–1472. NEIL, WARDEN *v.* PENDERGRASS. C. A. 6th Cir. Reported below: 456 F. 2d 469;

No. 71–1495. COWAN, PENITENTIARY SUPERINTENDENT *v.* BRUCE. C. A. 6th Cir. Reported below: 457 F. 2d 365; and

No. 72–400. ROSE, WARDEN *v.* RIVERA. C. A. 6th Cir. Reported below: 465 F. 2d 727. Motions of respondents for leave to proceed *in forma pauperis* and certiorari granted. Judgments vacated and cases remanded for further consideration in light of *Michigan* v. *Payne, ante,* p. 47, and *Chaffin* v. *Stynchcombe, ante,* p. 17. MR. JUSTICE DOUGLAS would affirm the judgments. See *Michigan* v. *Payne, ante,* p. 58, *Chaffin* v. *Stynchcombe, ante,* p. 35, and *Moon* v. *Maryland,* 398 U. S. 319, 321 (1970), dissenting opinions.

No. 71–1281. LINDER, WARDEN *v.* RECOR. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Chaffin* v. *Stynchcombe, ante,* p. 17. MR. JUSTICE DOUGLAS would affirm the judgment. See *Chaffin* v. *Stynchcombe, ante,* p. 35, and *Moon* v. *Maryland,* 398 U. S. 319, 321 (1970) (dissenting opinions).

No. 72–761. UNITED STATES *v.* MCGRATH. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *United States* v. *Russell*, 411 U. S. 423 (1973). Reported below: 468 F. 2d 1027.

Certiorari Granted—Reversed. (See No. 72–1310, *ante*, p. 543.)

Miscellaneous Orders

No. D–10. IN RE DISBARMENT OF KIRTZ. It is ordered that Frank G. Kirtz, of St. Louis, Missouri, be suspended from the practice of law in this Court and that a rule issue returnable within 40 days requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. A–1034. RUDERER *v.* JOHNSON. Application for equitable relief by injunction and enforcement of orders, etc., denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this application.

No. 35, Orig. UNITED STATES *v.* MAINE ET AL. Motion of Commonwealth of Massachusetts for preliminary injunction denied. MR. JUSTICE DOUGLAS would grant the preliminary injunction. [For earlier orders herein, see, *e. g.*, 408 U. S. 917.]

No. 72–700. HERNANDEZ ET AL. *v.* VETERANS' ADMINISTRATION ET AL. C. A. 9th Cir. Certiorari granted, 411 U. S. 981. Motion of petitioners for leave to proceed on original record granted.

No. 72–936. UNITED STATES *v.* ROBINSON. C. A. D. C. Cir. [Certiorari granted, 410 U. S. 982.] Motion of Americans for Effective Law Enforcement, Inc., et al., for leave to file a brief as *amici curiae* in support of petitioner granted.

No. A–1194 (72–1418). SENDAK, ATTORNEY GENERAL OF INDIANA *v.* DILLIN, U. S. DISTRICT JUDGE. C. A. 7th Cir. Application for stay of order of U. S. District Court for the Southern District of Indiana, dated March 19, 1973, denied.

No. A–1196 (72–6862). BROWN *v.* UNITED STATES. C. A. 4th Cir. Application for stay of mandate presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. 72–6753. HYDE *v.* CRAVEN, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 72–6555. PARKER *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

No. 72–6608. RICE *v.* BOURBON CIRCUIT COURT, PARIS, KENTUCKY. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted

No. 72–1035. ROGERS *v.* LOETHER ET AL. C. A. 7th Cir. Motion to dispense with printing respondents' brief and petition for writ of certiorari granted. Case set for oral argument with No. 72–6041 [*Pernell* v. *Southall Realty*, certiorari granted, 411 U. S. 915]. Reported below: 467 F. 2d 1110.

No. 72–1322. BRADLEY ET AL. *v.* SCHOOL BOARD OF THE CITY OF RICHMOND ET AL. C. A. 4th Cir. Certiorari granted. MR. JUSTICE MARSHALL and MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 472 F. 2d 318.

No. 72–1410. EDELMAN, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS *v.* JORDAN. C. A. 7th Cir. Mo-

tion of respondent Jordan for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 472 F. 2d 985.

No. 72–6476. HAGANS ET AL. *v.* LAVINE, COMMISSIONER, NEW YORK DEPARTMENT OF SOCIAL SERVICES, ET AL. C. A. 2d Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 471 F. 2d 347.

No. 72–6520. LAU ET AL. *v.* NICHOLS ET AL. C. A. 9th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted.

Certiorari Denied. (See also No. 72–6350, *supra.*)

No. 72–1163. BITHONEY ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 472 F. 2d 16.

No. 72–1166. WRIGHT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 468 F. 2d 1184.

No. 72–1179. KANAREK *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 72–1182. GAUS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 471 F. 2d 495.

No. 72–1198. AN ARTICLE OF DRUG . . . "BENTEX ULCERINE" *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 875.

No. 72–1235. WHITMAN CENTER, INC. *v.* GULF OIL CORP. C. A. 9th Cir. Certiorari denied.

No. 72–1285. STANDARD OIL CO., INC., ET AL. *v.* WRIGHT ET UX. C. A. 5th Cir. Certiorari denied. Reported below: 470 F. 2d 1280.

No. 72–1300. RUGGIERO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 472 F. 2d 599.

No. 72–1306. RADIO-TELEVISION, S. A., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied.

No. 72–1309. WOOD, WIRE & METAL LATHERS INTERNATIONAL UNION, LOCAL UNION 46, ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 471 F. 2d 408.

No. 72–1321. NORTHERN NATURAL GAS CO. ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 470 F. 2d 1107.

No. 72–1325. MANGAIAMELI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–1329. H. KESSLER & CO. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 472 F. 2d 1147.

No. 72–1346. RYAN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE ET AL. C. A. 7th Cir. Certiorari denied.

No. 72–1351. ARBAUGH'S RESTAURANT, INC. *v.* SMITH ET UX. C. A. D. C. Cir. Certiorari denied. Reported below: 152 U. S. App. D. C. 86, 469 F. 2d 97.

No. 72–1361. WOOD *v.* UNITED STATES POST OFFICE DEPARTMENT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 472 F. 2d 96.

No. 72–1380. BRELAND *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 489 S. W. 2d 623.

No. 72–1390. SANSANESE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–1402. CALANDRILLO *v.* O'CONNOR ET AL. Super. Ct. N. J. Certiorari denied. Reported below: 121 N. J. Super. 135, 296 A. 2d 326.

No. 72–1403. LOCAL 42, INTERNATIONAL ASSOCIATION OF HEAT & FROST INSULATORS & ASBESTOS WORKERS *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 469 F. 2d 163.

No. 72–1417. SIMMONS *v.* WETHERELL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 472 F. 2d 509.

No. 72–1419. STROM ET AL. *v.* ALFVEBY, REFEREE. C. A. 8th Cir. Certiorari denied.

No. 72–1421. DEKALB COUNTY ET AL. *v.* ATLANTA GAS LIGHT CO. ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 230 Ga. 65, 195 S. E. 2d 427.

No. 72–1430. PERKINS *v.* STANDARD OIL COMPANY OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 474 F. 2d 549.

No. 72–1433. INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 12 *v.* SOUTHERN CALIFORNIA TESTING LABORATORY, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 72–1456. MCCLUNG *v.* FORD MOTOR CO. C. A. 4th Cir. Certiorari denied. Reported below: 472 F. 2d 240.

No. 72–1459. STOCKHOLDERS' PROTECTIVE COMMITTEE FOR MOULDED PRODUCTS, INC. *v.* BARRY, TRUSTEE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 474 F. 2d 220.

No. 72–1607. PFINGST *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 477 F. 2d 177.

No. 72–5507. WILLIAMS *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 1136.

No. 72–6282. MORTON *v.* WYOMING ET AL. C. A. 10th Cir. Certiorari denied.

No. 72–6290. BRUCE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 72–6312. CASTELLON-DUARTE *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

No. 72–6443. MACKEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 474 F. 2d 55.

No. 72–6447. STANFIELD *v.* UNITED STATES; and
No. 72–6448. TERRELL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 72–6459. BILLINGSLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 72–6460. ISENBERG *v.* UNITED STATES; and
No. 72–6466. ISENBERG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 72–6463. WALSH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 72–6464. BARROW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 72–6468. LAUGHLIN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 154 U. S. App. D. C. 196, 474 F. 2d 444.

No. 72–6469. BATTLE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 72–6478. LAVAN ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–6481. HAMILTON *v.* UNITED STATES; and
No. 72–6482. BENTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 72–6483. TUCKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 473 F. 2d 1290.

No. 72–6485. MCDONNELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 472 F. 2d 1153.

No. 72–6489. NOCERINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 474 F. 2d 993.

No. 72–6495. KUNG HOW FONG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 475 F. 2d 189.

No. 72–6568. SCHUTT *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 72–6593. COOK ET UX. *v.* OHIO. C. A. 6th Cir. Certiorari denied.

No. 72–6598. BOAG *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 72–6607. MORGAN *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 72–6623. ROY *v.* MANCHESTER GAS CO. Sup. Ct. N. H. Certiorari denied. Reported below: 113 N. H. 140, 302 A. 2d 825.

No. 72–6625. BRADLEY *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 473 F. 2d 1039.

No. 72–6633. ECKERT *v.* BUDD CO. ET AL. C. A. 3d Cir. Certiorari denied.

No. 72–6691. BEZAK *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 72–1305. GRAY ET AL. *v.* SHELL OIL CO. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 469 F. 2d 742.

No. 72–1362. STRINGER ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 471 F. 2d 381.

No. 72–1443. SAVARD, ADMINISTRATRIX, ET AL. *v.* PERINI CORP. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 471 F. 2d 536.

No. 72–6467. SHEARD, AKA NIXON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 154 U. S. App. D. C. 9, 473 F. 2d 139.

No. 72–6622. MOORE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 54 Ill. 2d 33, 294 N. E. 2d 297.

No. 72–6666. THOMPSON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: —— Ind. ——, 290 N. E. 2d 724.

No. 72–1389. PENNSYLVANIA *v.* STAFFORD. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 450 Pa. 252, 299 A. 2d 590.

No. 72–1424. VOWELL, COMMISSIONER OF PUBLIC WELFARE OF TEXAS *v.* RODRIGUEZ ET AL. C. A. 5th Cir. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 472 F. 2d 622.

No. 72–1426. NANES *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A 5th Cir. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 471 F. 2d 651.

Rehearing Denied

No. 71–1178. GULF STATES UTILITIES CO. *v.* FEDERAL POWER COMMISSION ET AL., 411 U. S. 747;

No. 72–1086. DELONG CORP. ET AL. *v.* OREGON, BY AND THROUGH STATE HIGHWAY COMMISSION, 411 U. S. 965;

No. 72–1281. ESSEX, ADMINISTRATRIX *v.* WALTERS, COMMISSIONER OF INTERNAL REVENUE, ET AL., *ante*, p. 919;

No. 72–5572. GAY *v.* UNITED STATES, 411 U. S. 974;

No. 72–6211. LUCAS *v.* WYOMING ET AL., 411 U. S. 983;

No. 72–6374. RANDO *v.* ESTELLE, CORRECTIONS DIRECTOR, 411 U. S. 972;

No. 72–6410. WALTERS *v.* WALTERS, COMMISSIONER OF INTERNAL REVENUE, 411 U. S. 985;

No. 72–6452. MORRIS *v.* SPARROW ET AL., 411 U. S. 985; and

No. 72–6496. GERMAN *v.* FLORIDA ET AL., *ante*, p. 908. Petitions for rehearing denied.

No. 71–6423. HOUSE *v.* HOUSE, 409 U. S. 812; and

No. 72–1084. GROSSMAN *v.* KAVANAGH, CHIEF JUSTICE, SUPREME COURT OF MICHIGAN, 411 U. S. 914. Motions for leave to file petitions for rehearing denied.

No. 72–1134. REIBERT ET AL. *v.* ATLANTIC RICHFIELD CO. ET AL., 411 U. S. 938, and *ante*, p. 914. Motion for leave to file second petition for rehearing denied.

No. 72–5925. RUDERER *v.* SESSIONS ET AL., 410 U. S. 949;

No. 72–6153. RUDERER *v.* UNITED STATES ARMY AVIATION MATERIEL COMMAND ET AL., 411 U. S. 928; and

No. 72–6255. RUDERER *v.* UNITED STATES ET AL., 411 U. S. 945. Motions for leave to file petitions for rehearing and all other relief denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of these motions.

No. 72–6271. RUDERER *v.* VANCE ET AL., 411 U. S. 961. Petition for rehearing and all other relief denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

JUNE 13, 1973

Miscellaneous Orders

No. A–1221. SHAPIRO *v.* FERRANDINA. C. A. 2d Cir. Application for stay of mandate presented to MR. JUSTICE MARSHALL and by him referred to the Court, denied. MR. JUSTICE DOUGLAS would grant the application. Reported below: 478 F. 2d 894.

No. A–1206 (72–1173). INTERNATIONAL BUSINESS MACHINES CORP. *v.* UNITED STATES. Application for stay of execution and enforcement of pretrial order No. 5 of the United States District Court for the Southern District of New York and for a stay of mandate of the United States Court of Appeals for the Second Circuit presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. MR. JUSTICE STEWART, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL took no part in

the consideration or decision of this application. MR. JUSTICE DOUGLAS would grant the application. Reported below: See 471 F. 2d 507.

JUNE 18, 1973

Dismissal Under Rule 60

No. 72–1573. APPLEGATE ET AL. *v.* NEW JERSEY. Super. Ct. N. J. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court.

Affirmed on Appeal

No. 72–1565. UNITED STATES *v.* TRANS TEXAS BANCORPORATION, INC., ET AL. Affirmed on appeal from D. C. W. D. Tex. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument.

Appeals Dismissed

No. 72–1259. TEITELBAUM *v.* CALIFORNIA. Appeal from Ct. App. Cal., 2d App. Dist. Motion to dispense with printing jurisdictional statement granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 72–6329. MCALLISTER *v.* VIRGINIA. Appeal from Sup. Ct. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 72–6385. LOGAN *v.* WESTERN UNION TELEGRAPH CO. Appeal from D. C. S. D. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Vacated and Remanded on Appeal

No. 72–635. GLUSMAN ET AL. *v.* BOARD OF TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA. Appeal from Sup. Ct. N. C. Judgment vacated and case remanded for further consideration in light of *Vlandis* v. *Kline, ante,* p. 441. MR. JUSTICE DOUGLAS would affirm the judgment. Reported below: 281 N. C. 629, 190 S. E. 2d 213.

Certiorari Granted—Vacated and Remanded

No. 72–6012. KELSAW *v.* OREGON. Ct. App. Ore. Motion for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Wardius* v. *Oregon, ante,* p. 470. MR. JUSTICE DOUGLAS would grant certiorari and reverse the judgment for reasons set forth in his separate opinion in *Wardius* v. *Oregon, ante,* p. 479. Reported below: 11 Ore. App. 289, 502 P. 2d 278.

Miscellaneous Orders

No. A–1079. JOHNSON *v.* MISSOURI. Sup. Ct. Mo. Application for bail presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–1186. WALLER *v.* FLORIDA. Application for stay of execution and enforcement of judgment of conviction in Circuit Court for Pinellas County, Florida, presented to MR. JUSTICE POWELL, and by him referred to the Court, granted pending further order of this Court.

No. 72–1035. ROGERS *v.* LOETHER ET AL. C. A. 7th Cir. [Certiorari granted, *ante,* p. 937.] Motion of respondents for leave to proceed further herein *in forma pauperis* or in the alternative to submit respondents' brief in typewritten form denied.

No. 72–1086. DELONG CORP. ET AL. *v.* OREGON, BY AND THROUGH STATE HIGHWAY COMMISSION, 411 U. S. 965. Motion of respondent for allowance of attorney's fees denied.

No. 72–1264. MAYOR OF PHILADELPHIA ET AL. *v.* EDUCATIONAL EQUALITY LEAGUE ET AL. C. A. 3d Cir. [Certiorari granted, 411 U. S. 964.] Motion of respondents for leave to proceed further herein *in forma pauperis* denied.

No. 72–1355. UNITED STATES *v.* MATLOCK. C. A. 7th Cir. [Certiorari granted, *ante*, p. 917.] Motion of respondent for appointment of counsel granted. It is ordered that Donald S. Eisenberg, Esquire, of Madison, Wisconsin, be, and he is hereby, appointed as counsel for respondent in this case.

No. 72–6534. ORSINGER *v.* RICHARDSON, ATTORNEY GENERAL. Motion for leave to file petition for writ of habeas corpus denied.

Probable Jurisdiction Noted

No. 72–1465. PROCUNIER, CORRECTIONS DIRECTOR, ET AL. *v.* MARTINEZ ET AL. Appeal from D. C. N. D. Cal. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 354 F. Supp. 1092.

Certiorari Denied. (See also Nos. 72–1259, 72–6329, and 72–6385, *supra.*)

No. 72–1218. VALENTINE ET AL. *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 264 Ore. 54, 504 P. 2d 84.

No. 72–1345. MOSCA ET AL. *v.* UNITED STATES;

No. 72–6456. WOLFSON *v.* UNITED STATES; and

No. 72–6479. ZAVOD ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 475 F. 2d 1052.

No. 72–1368. ROSCIANO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 474 F. 2d 1350.

No. 72–1370. BERLIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 472 F. 2d 1002.

No. 72–1374. NEFF *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 475 F. 2d 861.

No. 72–1383. DECKER ET AL. *v.* WEINSTEIN, TRUSTEE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 72–1387. AMERICAN CONCRETE CONSTRUCTION CO., INC., ET AL. *v.* BRENNAN, SECRETARY OF LABOR. C. A. 6th Cir. Certiorari denied. Reported below: 471 F. 2d 1183.

No. 72–1414. MUELLER *v.* NIXON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 470 F. 2d 1348.

No. 72–1418. SENDAK, ATTORNEY GENERAL OF INDIANA *v.* DILLIN, U. S. DISTRICT JUDGE. C. A. 7th Cir. Certiorari denied.

No. 72–1431. LEONHARD *v.* RICHARDSON, ATTORNEY GENERAL, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 473 F. 2d 709.

No. 72–1434. HITCHCOCK *v.* CIVIL SERVICE COMMISSION OF CITY OF MOSES LAKE. Ct. App. Wash. Certiorari denied.

No. 72–1435. ROBBINS *v.* NOBLE DRILLING CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 471 F. 2d 651.

No. 72–1442. TRAVELERS INSURANCE CO. *v.* CHOUEST. C. A. 5th Cir. Certiorari denied. Reported below: 472 F. 2d 1026.

No. 72–1444. KELLEN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 49 Ala. App. 467, 273 So. 2d 227.

No. 72–1451. LAVINE, COMMISSIONER, NEW YORK DEPARTMENT OF SOCIAL SERVICES *v.* LINDSAY, MAYOR OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 473 F. 2d 923.

No. 72–1452. OWNBY *v.* UNITED STATES. C. C. P. A. Certiorari denied. Reported below: 471 F. 2d 1233.

No. 72–1464. VAN VLIET *v.* LEBOSQUET. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 72–1466. ADMINISTRATOR, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION *v.* WILLIAMS ET AL. C. C. P. A. Certiorari denied. Reported below: 59 C. C. P. A. (Pat.) 1329, 463 F. 2d 1391.

No. 72–1467. PERRERRA ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 474 F. 2d 1246.

No. 72–1468. WILSON *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 600.

No. 72–1471. AMERICAN DAIRY ASSN. ET AL. *v.* RASMUSSEN. C. A. 9th Cir. Certiorari denied. Reported below: 472 F. 2d 517.

No. 72–5432. BROWN *v.* JOSEPH. C. A. 3d Cir. Certiorari denied. Reported below: 463 F. 2d 1046.

No. 72–6115. JACKSON *v.* ZELKER, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 72–6231. GUTHRIE *v.* GEORGIA. C. A. 5th Cir. Certiorari denied.

No. 72–6233. KENNEDY *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 469 F. 2d 1405.

No. 72–6286. NELSON *v.* MOORE, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied. Reported below: 470 F. 2d 1192.

No. 72–6316. BURBANK *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 53 Ill. 2d 261, 291 N. E. 2d 161.

No. 72–6365. CONKLIN *v.* GASAWAY, TRUSTEE. C. A. 8th Cir. Certiorari denied. Reported below: 468 F. 2d 752.

No. 72–6372. MCLEOD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 470 F. 2d 962.

No. 72–6379. SAUNDERS *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 470 F. 2d 734.

No. 72–6401. EVANS *v.* JOHNSON, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 72–6455. OWENS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 472 F. 2d 780.

No. 72–6490. MONTGOMERY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 72–6498. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 470 F. 2d 684.

No. 72–6507. IRONS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 475 F. 2d 40.

No. 72–6511. WOODS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 474 F. 2d 1343.

No. 72–6512. JUDSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 72–6524. HANKS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 72–6532. KRULL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 1345.

No. 72–6546. COPELAND *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 471 F. 2d 710.

No. 72–6585. ANDRADE *v.* HAUCK, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 468 F. 2d 950.

No. 72–6635. BABCOCK *v.* SWENSON, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 72–6641. CRENSHAW *v.* JAMES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 471 F. 2d 655.

No. 72–6643. SMILEY *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 473 F. 2d 682.

No. 72–6656. CLEVELAND *v.* WARDEN, MARYLAND STATE PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 72–6664. HIGGENS, AKA ROBINSON *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 16 N. C. App. 434, 192 S. E. 2d 93.

No. 72–6673. OAKES *v.* BLACK, REFORMATORY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 473 F. 2d 672.

No. 72–6674. LEMMO *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 72–1041. DOUGLAS ET AL. *v.* COVELL. Sup. Ct. Colo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE DOUGLAS would grant the petition and affirm the judgment. Reported below: —— Colo. ——, 501 P. 2d 1047.

No. 72–1090. ANNUNZIO *v.* HOELLEN. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 468 F. 2d 522.

No. 72–1249. STOVER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–1317. WHITAKER ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 474 F. 2d 1246.

No. 72–1340. STANLEY ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 472 F. 2d 1204.

No. 72–1377. METROPOLITAN SCHOOL DISTRICT OF LAWRENCE TOWNSHIP, MARION COUNTY, INDIANA, ET AL. *v.* DILLIN, U. S. DISTRICT JUDGE, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6499. RETHERFORD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 270 So. 2d 363.

No. 72–6513. CIOFFI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6523. MANCINO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 474 F. 2d 1240.

No. 72–6647. GRON *v.* VICONOVIC. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–6689. RODRIGUEZ ET AL. *v.* JONES ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 473 F. 2d 599.

No. 72–1260. McCune *v.* Nebraska. Sup. Ct. Neb. Motion to dispense with printing petition granted. Certiorari denied. Reported below: 189 Neb. 165, 201 N. W. 2d 852.

No. 72–1350. Meisel et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 472 F. 2d 548.

Mr. Justice Douglas, dissenting.

Electronic surveillance has increasingly infected criminal trials. My hearing in the *Pentagon Papers* case last summer (*Russo* v. *Byrne*, 409 U. S. 1219), was the beginning of vast disclosures which showed how seriously that trial had in fact been infected. See also 409 U. S. 1013. The indictments involved in it were indeed later dismissed, in part on the grounds that the prosecution failed to disclose the existence and results of wiretaps.

It has become painfully apparent that wiretapping and electronic surveillance are a commonplace tool of those who pursue prosecutions with zeal that knows no bounds, not even the clear mandate of our Constitution or laws. The Nation early eschewed this Machiavellian philosophy.

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable

> intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." *Olmstead* v. *United States,* 277 U. S. 438, 478 (Brandeis, J., dissenting).

This case presents a more related facet of the problem than *Russo* v. *Byrne, supra.* Here we are concerned with witnesses called to testify before the grand jury. See *Tierney* v. *United States,* 410 U. S. 914 (DOUGLAS, J., dissenting). This particular grand jury was investigating firearms transactions between certain Irish-Americans and the Irish Republican Army. The center of attention apparently was one Charles Farrell Malone, who, subsequent to the proceedings below, pleaded guilty to a federal firearms offense. Petitioners, one a friend of Malone's and the other a babysitter for his seven children, were subpoenaed to appear before the grand jury on October 25 and 26, 1972. Both appeared but refused to testify. Approximately one month later, the Government advised petitioners' counsel that it would apply for an order granting petitioners testimonial immunity, see 18 U. S. C. § 6003, and in the event immunity was granted and petitioners still refused to testify, it would seek immediately to have petitioners held in contempt.

On November 28 petitioners were granted immunity, and the same morning they were brought before the grand jury. They refused to testify on the grounds, *inter alia,* that the questions propounded to them were the product of illegal electronic surveillance of themselves and *their attorney.*[1] The contempt hearing took place

[1] Petitioners' attorney, who also represented Malone, who had been indicted before petitioners were granted immunity, had withdrawn as counsel that morning in order to avoid any conflict of interest. It is clear to me that we must treat that attorney as petitioners' counsel in considering their constitutional rights before the grand jury.

at 2 o'clock that afternoon. Petitioners again asserted that they had been subjected to illegal electronic surveillance, and they submitted *an affidavit of their attorney claiming that his telephones had been wiretapped.* The Government attorney filed affidavits disclaiming any surveillance upon petitioners or their premises. The affiant also stated that he knew "the identity of all the sources of information upon which the questioning of [petitioners] is based and no questions asked are the result of electronic surveillance . . . ." *The Government did not specifically respond to the allegation that the attorney had been subjected to surveillance.*

Based upon these affidavits and oral argument, the District Court held petitioners in civil contempt. The District Judge refused to hold a hearing regarding the claims of electronic surveillance and wiretapping or to require the Government to search its files to assure the nonexistence of electronic surveillance on their attorney. Bail was denied, and petitioners were ordered to jail for the life of the grand jury, but not to exceed 18 months. The Court of Appeals, however, granted bail pending appeal. On December 29, 1972, the Court of Appeals affirmed the contempt adjudications and revoked bail. 472 F. 2d 548. I ordered that petitioners be released on their own recognizance pending the timely filing and disposition of a petition for a writ of certiorari. I now would grant their petition and set this case for oral argument.

The sole ground for denying a hearing was the Government disclaimer that petitioners themselves had been subject to electronic surveillance or that any questions to be asked were the result of surveillance of third parties. In *Alderman* v. *United States,* 394 U. S. 165, we held that when the results of electronic surveillance are arguably relevant to the defense, the records must be

submitted for adversary hearing before the trial judge. "Adversary proceedings are a major aspect of our system of criminal justice. Their superiority as a means for attaining justice in a given case is nowhere more evident than in those cases, such as the ones at bar . . . ." *Id.*, at 183. I find the failure to afford a hearing especially troubling in this case. The Government's affiant, an official of the Internal Security Division of the Justice Department, stated that he had "caused an inquiry to be made" among certain listed federal agencies and this inquiry had not disclosed that petitioners had been subject to any illegal electronic surveillance. Even though the subject of the grand jury investigation was firearms transactions with the Irish Republican Army, the affiant had not checked with military intelligence agencies. We have learned that the results of illegal surveillance often are secreted away, whether for reasons of national security or for fear of public disclosure. For that reason, no stone should remain unturned. Although the District Judge himself was concerned with the failure to consult with these agencies, he nevertheless denied petitioners an evidentiary hearing either on the adequacy of the Government's denial or the actual existence of surveillance of petitioners by more federal agencies. Moreover, the *Government totally failed to respond to the claim that petitioners' attorney had been subjected to illegal surveillance.*[2]

We should no longer tolerate procedures which allow the prosecution to pyramid the secrecy of its clandestine

[2] In *Gelbard* v. *United States*, 408 U. S. 41, we held that a grand jury witness has standing to challenge questions propounded to him on the ground that they are derived from illegal electronic surveillance. The interrelationship of the Fourth, Fifth, and Sixth Amendments in this area requires, in my mind, that this rule extend to surveillance of a witness' attorney. See *Tierney* v. *United States*, 410 U. S. 914 (DOUGLAS, J., dissenting).

activities.[3] It is by no means an easy task to uncover the intricacies and interrelationships of the Executive's ever-expanding security mechanism, but we certainly cannot even start without the rudiments of due process.

No. 72–1409. LOCAL UNION 1791, UNITED MINE WORKERS OF AMERICA, ET AL. *v.* McGUIRE SHAFT & TUNNEL CORP. ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 475 F. 2d 1209.

MR. JUSTICE DOUGLAS, dissenting.

We are asked to review a decision of the Temporary Emergency Court of Appeals holding that § 210 (a) of the Economic Stabilization Act of 1970,[1] 84 Stat. 799, as amended, 85 Stat. 748, 12 U. S. C. § 1904, Note (1970 ed., Supp. II), overrides the anti-injunction provisions of

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[3] As we said in *Alderman* v. *United States*, 394 U. S. 165:

"An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of a telephone, or even the manner of speaking or using words may have special significance to one who knows the more intimate facts of an accused's life. And yet that information may be wholly colorless and devoid of meaning to one less well acquainted with all relevant circumstances. Unavoidably, this is a matter of judgment, but in our view the task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court to identify those records which might have contributed to the Government's case." *Id.*, at 182.

[1] That section provides:

"Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages."

the Norris-LaGuardia Act,[2] 47 Stat. 70, 29 U. S. C. § 101 *et seq.*, and permits a district court to enjoin a work stoppage in violation of regulations of the Pay Board.

On January 14, 1972, respondent construction companies entered into a collective-bargaining agreement with the United Mine Workers of America providing for a wage increase in excess of 18%. In accordance with the Economic Stabilization Act, this agreement was submitted to the Pay Board for approval, but the Board authorized an increase of only 9.54%. Subsequently, employees of the construction companies, members of three different locals of the United Mine Workers, went out on strike in support of their demand for a wage increase as provided by the agreement. Pickets soon appeared at five coal mines operated by two other respondents, and the miners honored the picket lines.

The four employers affected by the work stoppages immediately sought preliminary injunctions from the District Court. The District Court issued the injunctions, and the Temporary Emergency Court of Appeals affirmed.[3] 475 F. 2d 1209. It determined that the work stoppages constituted a violation of § 1 (a) of Executive

[2] Section 1 of the Norris-LaGuardia Act provides:

"That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act."

Section 4 specifies acts which may not be enjoined, including "[c]easing or refusing to perform any work or to remain in any relation of employment."

[3] The District Court also concluded that the strike violated provisions of the collective-bargaining agreement and could be enjoined under *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770,* 398 U. S. 235. The Court of Appeals did not reach this issue.

Order 11640, which provides that "no person shall, directly or indirectly, . . . use any means to obtain payment of wages and salaries in any form, higher than those permitted hereunder . . . ." 37 Fed. Reg. 1214. It also determined that the stoppages constituted a violation of Pay Board Reg. § 201.17 (c), which provided that it shall be a violation of Pay Board regulations to "[i]nduce, solicit, encourage, force, or require, or attempt to induce, solicit, encourage, force or require, any other person to pay or to receive any portion of a wage and salary increase not authorized by such regulations or Pay Board decision . . . ." 6 CFR § 201.17 (c) (1972). The court concluded that respondents were persons "suffering legal wrong" within the meaning of § 210 (a) of the Economic Stabilization Act of 1970 and were thereby entitled to injunctive relief. As to petitioners' claim that the Norris-LaGuardia Act barred injunctive relief against a union work stoppage in an action brought by an employer,[4] the court stated:

> "In light of the importance of the Economic Stabilization Program to economic welfare of the United States, the Norris-LaGuardia Act must be interpreted to accommodate the overriding Congressional intent expressed in the Economic Stabilization Act. Such accommodations have been made in the past when the provisions of the Norris-LaGuardia Act conflicted with other specific intentions of Congress." 475 F. 2d, at 1215.

Heretofore, this Court has recognized implicit exceptions to the anti-injunction provisions of the Norris-LaGuardia Act only when there was an unavoidable clash

[4] Petitioners concede that the Norris-LaGuardia prohibitions do not apply in Government suits to enforce the Economic Stabilization Act. See § 209 of the Act, 85 Stat. 748.

with other *labor* legislation. See, *e. g., Boys Markets, Inc.* v. *Retail Clerks Union, Local 770,* 398 U. S. 235 (§ 301 of the Labor Management Relations Act); *Brotherhood of Railroad Trainmen* v. *Howard,* 343 U. S. 768. We have stated before that "the Norris-LaGuardia Act's ban on federal injunctions is not lifted because the conduct of the union is unlawful under some other, nonlabor statute." *Order of Railroad Telegraphers* v. *Chicago & N. W. R. Co.,* 362 U. S. 330, 339. See also *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.,* 353 U. S. 30, 42. The unmistakable mandate of the Norris-LaGuardia Act is to preclude the federal courts from interfering with peaceful labor disputes by resort to "objective tests." See *Order of Railroad Telegraphers* v. *Chicago & N. W. R. Co., supra,* at 336; *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.,* 311 U. S. 91, 101. Although the Economic Stabilization Act affects wages, it is clear to me that it falls within the area of general economic legislation rather than the narrow scope of "labor legislation" as that concept is used in our prior decisions.

Moreover, even when we have carved out an exception to the Norris-LaGuardia Act to accommodate it with later, more specific labor legislation, we have circumscribed the courts' discretion to award injunctive relief. In *International Association of Machinists* v. *Street,* 367 U. S. 740, 772–773, we stated:

> "The Norris-LaGuardia Act . . . expresses a basic policy against the injunction of activities of labor unions. . . . [T]he policy of the Act suggests that the courts should hesitate to fix upon the injunctive remedy for breaches of duty owing under the labor laws unless that remedy alone can effectively guard the plaintiff's right."

Petitioners contend that private injunctions are not a necessary part of the enforcement scheme of the Economic Stabilization Act, which includes provisions for governmental enforcement, supplemented by private actions for damages.

Finally, § 210 (a) of the Economic Stabilization Act provides for "appropriate relief." Petitioners argue that the word "appropriate" must be construed to encompass the ordinary constraints of federal equity jurisprudence, thus precluding private suits for injunctive relief against a union in a labor dispute.[5] See *Hecht Co.* v. *Bowles*, 321 U. S. 321. They buttress this argument with the assertion that the legislative history of the Act gives no indication that § 210 (a) was meant to override the anti-injunction provisions of the Norris-LaGuardia Act.

To my mind, this case presents substantial questions that deserve consideration by this Court. The decision below is a clear extension of the accommodation doctrine as it has developed in this Court and threatens to erode the Norris-LaGuardia Act. We hardly can conclude that wage and price controls are merely a specter of the past. I would grant the petition for a writ of certiorari and set the case for oral argument. I would not without impelling legislative reasons make the Norris-LaGuardia Act—once the pillar of labor strength—a mere ghost to be driven hence by the slogan "stabilization" and made a mockery by financial aggrandizement.

No. 72–6359. REECE *v.* CRAVEN, WARDEN. Sup. Ct. Cal. Certiorari denied. MR. JUSTICE DOUGLAS concurs in the denial of certiorari solely because the judgment below rests on an adequate state ground.

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[5] The Government contended below, as *amicus curiae*, that the dispute between the parties does not come within the Norris-LaGuardia Act's definition of "labor dispute," 29 U. S. C. § 113 (c).

No. 72–6526. MUNCASTER *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to file an amended petition granted. Certiorari denied. Reported below: 472 F. 2d 1407.

Rehearing Denied

No. 72–10. MOOR ET AL. *v.* COUNTY OF ALAMEDA ET AL., 411 U. S. 693;

No. 72–1112. COFFEE-RICH, INC., ET AL. *v.* FIELDER, DIRECTOR OF AGRICULTURE, ET AL., 411 U. S. 979;

No. 72–1199. CULPEPPER *v.* UNITED STATES, 411 U. S. 982;

No. 72–5398. GARDNER *v.* MCCARTHY, FACILITY SUPERINTENDENT, *ante*, p. 916;

No. 72–5964. BLACK ET AL. *v.* ILLINOIS, 411 U. S. 967;

No. 72–6090. KING *v.* CALIFORNIA, 411 U. S. 983;

No. 72–6149. HOUSE *v.* ST. AGNES HOSPITAL, INC., ET AL., 411 U. S. 961;

No. 72–6197. SHOEMAKER *v.* DWYER ET AL., *ante*, p. 902;

No. 72–6392. WHEELER *v.* UNITED STATES, *ante*, p. 921;

No. 72–6423. MENDES *v.* BROTHERHOOD OF RAILWAY & AIRLINE CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES, AFL–CIO–CLC, ET AL., 411 U. S. 971; and

No. 72–6603. JAYNES *v.* JAYNES ET AL., *ante*, p. 931. Petitions for rehearing denied.

No. 6505, October Term, 1970. NIEMEYER *v.* CICCONE, MEDICAL CENTER DIRECTOR, ET AL., 401 U. S. 1011. Motion for leave to file petition for rehearing denied.

No. 72–780. CALIFORNIA ADULT AUTHORITY ET AL. *v.* GRIFFIN ET AL., and

No. 72–5770. M'CLARY *v.* CALIFORNIA ADULT AUTHORITY ET AL., *ante*, p. 916. Petition for rehearing or modification denied.

No. 72–5935. RUDERER *v.* KLEINDIENST, ATTORNEY GENERAL, 410 U. S. 949. Motion for leave to file petition for rehearing and all other relief denied.

JUNE 19, 1973

Dismissal Under Rule 60

No. 72–6818. DIAZ-RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 478 F. 2d 1005.

Reporter's Note

The next page is purposely numbered 1201. The numbers between 964 and 1201 were intentionally omitted, in order to make it possible to publish in-chambers opinions in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

HENRY ET AL. *v.* WARNER, SECRETARY OF THE NAVY, ET AL.

ON APPLICATION TO VACATE ORDERS STAYING DISTRICT COURT JUDGMENT PENDING DISPOSITION OF CASE BY COURT OF APPEALS

No. A–1124. Decided May 18, 1973

1. Application to vacate Court of Appeals' stay of District Court's order in habeas corpus proceeding denied, Solicitor General having represented that applicants have been released and no uncounseled persons summarily court-martialed are in military confinement in Central District of California.

2. Question of District Court's authority to grant habeas corpus relief for unnamed class members outside District and/or on world-wide basis is so novel that relief should be granted only after full argument.

MR. JUSTICE DOUGLAS, Circuit Justice.

The application for an order vacating the stay of the Court of Appeals is denied on the representation of the Solicitor General that the named applicants in the case have all been released from confinement and that within the Central District of California no persons are currently confined in any military detention facility as a result of a conviction by summary court-martial without the aid of counsel. Whether the District Court has authority to issue a writ of habeas corpus for unnamed members of the class outside the District and/or on a worldwide basis is so novel a question that an order granting such relief should be issued only after full argument. Application denied.

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2. *Reinstatement of union member—Equitable powers of trial court—Labor-Management Reporting and Disclosure Act.*—Respondent's suit under § 102 vindicated not only his own rights of free speech guaranteed by the statute but furthered the interests of the union and its members as well. As a result, the award of attorneys' fees under these circumstances comported with the trial court's inherent equitable power of making such an award whenever "overriding considerations indicate the need for such recovery." Hall v. Cole, p. 1.

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II. Due Process.

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2. *Deprivation of property—Compensation while on jury duty.*—Alabama statute that provides that employee excused for jury duty "shall be entitled to his usual compensation . . . less the fee or compensation he received for serving" as a juror, does not deprive employer of property in violation of the Due Process Clause of the Fourteenth Amendment. Dean v. Gadsden Times Publishing Co., p. 543.

3. *Evidence—Statutory inference.*—If statutory inference submitted to jury as sufficient to support conviction satisfies the reasonable-doubt standard (*i. e.*, the evidence necessary to invoke the inference is sufficient for rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process. Barnes v. United States, p. 837.

4. *Increased sentence on retrial—Knowledge of jury.*—Rendition of higher sentence by jury on retrial does not violate the Double Jeopardy Clause, and does not offend the Due Process Clause as long as the jury is not informed of the prior sentence and the second sentence is not otherwise shown to be product of vindictiveness. Nor does the possibility of higher sentence impermissibly "chill" exercise of criminal defendant's right to challenge his first conviction by direct appeal or collateral attack. Chaffin v. Stynchcombe, p. 17.

5. *Increased sentence on retrial—Retroactivity.*—The "prophylactic" due process limitations established by *North Carolina* v. *Pearce*, 395 U. S. 711, to guard against the possibility of vindictiveness in cases where judge imposes more severe sentence after a new trial, are not retroactively applicable to resentencing proceedings that, like the one involved here, occurred prior to the date of the *Pearce* decision. Michigan v. Payne, p. 47.

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basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily true in fact, and when State has reasonable alternative means of making the crucial determination. Vlandis v. Kline, p. 441.

7. *Probation conditions—Traffic citation.*—Issuance of traffic citation was not an "arrest" under either Missouri or Arkansas law, and finding that petitioner violated his probation conditions was so totally devoid of evidentiary support as to violate due process. Even were it clear that respondent judge held Missouri law to be that traffic citation is equivalent to arrest, such an unforeseeable holding, retroactively applied, would also deprive petitioner of due process. Douglas v. Buder, p. 430.

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1. *District boundaries—Political incumbents.*—Though the drawing of district boundaries in a way that minimizes the number of contests between present incumbents does not of itself establish invidiousness, it is not necessary to decide whether such state interest will justify the deviations in S. B. 1, since Plan B serves this purpose as well with less population variance. White v. Weiser, p. 783.

2. *Population variances—Congressional reapportionment.*—Population variances do invidiously devalue the individual's vote at some point or level in size, and this is especially noticeable in congressional districts with their substantial population. Plan B, to a greater extent than Plan C, while eliminating population variances, adhered to the districting preferences of the state legislature, which has "primary jurisdiction" over legislative reapportionment. White v. Weiser, p. 783.

3. *Population variances—District lines.*—Although the percentage deviations in S. B. 1 are smaller than those invalidated in *Kirkpatrick* v. *Preisler*, 394 U. S. 526, and *Wells* v. *Rockefeller*, 394 U. S. 542, they were not "unavoidable" and the districts were not as mathematically equal as reasonably possible. The argument that variances are justified if they necessarily result from the State's attempt to avoid fragmenting political subdivisions by drawing district lines along existing political subdivision lines is not legally acceptable. White v. Weiser, p. 783.

4. *State legislative apportionment—Deviations in population.*—State reapportionment statutes are not subject to the stricter standards applicable to congressional reapportionment under Art. I, § 2, and the District Court erred in concluding that this case, where the

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total maximum variation between House districts was 9.9%, but the average deviation from the ideal was 1.82%, involved invidious discrimination in violation of the Equal Protection Clause. White v. Regester, p. 755.

5. *State legislative apportionment—Minor deviations.*—Minor deviations from mathematical equality among state legislative districts do not make out a prima facie case of invidious discrimination under the Equal Protection Clause of the Fourteenth Amendment, and in this case, where the House districts deviated on the average of 1.9% and the maximum deviation was 7.83%, a prima facie case was not made out. Gaffney v. Cummings, p. 735.

6. *State legislative apportionment—Political fairness.*—A "political fairness principle" that achieves a rough approximation of the statewide political strengths of the two major parties does not violate the Equal Protection Clause. Gaffney v. Cummings, p. 735.

7. *Texas legislative apportionment—Political discrimination.*—District Court's order requiring disestablishment of the multimember districts in Dallas and Bexar Counties was warranted in light of history of political discrimination against Negroes and Mexican-Americans residing, respectively, in those counties and the residual effects of such discrimination upon those groups. White v. Regester, p. 755.

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2. *Self-incrimination—Pressure to testify—Massing of evidence.*—Although the introduction of any evidence, direct or circumstantial, tending to implicate defendant in the alleged crime increases the pressure on him to testify, the mere massing of evidence against him cannot be regarded as a violation of his privilege against self-incrimination. Barnes v. United States, p. 837.

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2. *Search and seizure—Station-house detention—Probable cause—Fingernail scrapings.*—In view of station-house detention upon probable cause in murder case, the very limited intrusion, by taking scrapings from respondent's fingernails, undertaken to preserve highly evanescent evidence was not violative of the Fourth and Fourteenth Amendments. Cupp v. Murphy, p. 291.

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Denial of speedy trial—Remedy.—In light of policies underlying the right to a speedy trial, dismissal of the charges must remain, as noted in *Barker* v. *Wingo*, 407 U. S. 514, 522, "the only possible remedy" for deprivation of the constitutional right. Strunk v. United States, p. 434.

VIII. Speech or Debate Clause.

1. *Legislative report—Congressional staff.*—Congressional committee members, members of their staff, consultant, and investigator are absolutely immune under the Speech or Debate Clause insofar as they engaged in legislative acts of compiling report, referring it to the House, or voting for its publication. Doe v. McMillan, p. 306.

2. *Public distribution of congressional reports—Authorization from Congress.*—Clause does not afford absolute immunity from private suit to persons who, with authorization from Congress, perform function of publicly distributing materials that allegedly infringe upon the rights of individuals. Court of Appeals erred in holding that respondents who (except for committee members and personnel) were charged with public distribution were protected by the Clause. Doe v. McMillan, p. 306.

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COPYRIGHTS. See also **Constitutional Law,** I; IX.

1. *Copyright Clause—Federal-state relations—California's protection of recordings.*—Article I, § 8, cl. 8, of the Constitution does not expressly or by inference vest all power to grant copyright protection exclusively in the Federal Government. Unless Congress determines that the national interest requires federal protection or freedom from restraint as to a particular category of "Writings," state protection of that category is not precluded. Goldstein v. California, p. 546.

2. *Federal-state relations—Federal protection of recordings—California action against piracy.*—Although federal copyright statutes were amended in 1971 to allow federal protection of recordings, such protection was not intended to alter legal relationships governing recordings "fixed" prior to February 15, 1972. Until and unless Congress takes further action with respect to recordings "fixed" prior to that date, California remains free to proscribe acts of record or tape piracy such as those involved here. Goldstein v. California, p. 546.

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3. *Supremacy Clause—California's protection of recordings—Record piracy.*—California statute protecting recordings from piracy does not violate the Supremacy Clause by conflicting with federal copyright law. Goldstein v. California, p. 546.

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Assistance of counsel—Release from confinement.—Motion to vacate Court of Appeals' stay of District Court's order in habeas corpus proceeding denied, the Solicitor General having represented that movants have been released and no uncounseled persons summarily court-martialed are in military confinement in Central District of California. Henry v. Warner (DOUGLAS, J., in chambers), p. 1201.

COURTS OF APPEALS. See **Administrative Procedure**, 1–6; **Evidence**, 1–2; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Judicial Review**, 1; **Jurisdiction**, 1; **Procedure**, 3.

CRIMINAL LAW. See **Constitutional Law**, I; II, 1, 5; IV, 1; VI, 1–2; VII; IX; **Copyrights**, 1–3; **Evidence**, 3–5; **Indians**, 2; **Internal Revenue Code**, 2; **Jurisdiction**, 3; **Procedure**, 1–2, 5–7; **Search and Seizure**, 1–2; **Taxes**, 1.

CROSSING PICKET LINES. See **Administrative Procedure**, 7; **National Labor Relations Act**, 2; **Unions.**

DECLARATORY JUDGMENTS. See **Administrative Procedure**, 3; **Federal Food, Drug, and Cosmetic Act**, 6; **Procedure**, 3.

DECLARATORY RULINGS. See **Constitutional Law**, V; **Federal Communications Act.**

DEDUCTIONS FOR DEPRECIATION. See **Internal Revenue Code**, 1; **Taxes**, 2.

DEEDS. See **Federal-State Relations**, 1; **Public Lands.**

DEFENSES. See **Constitutional Law**, II, 1; **Procedure**, 1.

DELAYS. See **Constitutional Law**, VII; **Procedure**, 2.

DEMOCRATIC NATIONAL COMMITTEE. See **Constitutional Law**, V; **Federal Communications Act.**

DENIAL OF COSTS AND FEES. See **Attorneys' Fees**, 1; **Emergency School Aid Act of 1972.**

DENIAL OF SPEEDY TRIAL. See **Constitutional Law**, VII; **Procedure**, 2.

DEPARTMENT OF THE INTERIOR. See **Indians**, 1.

DEPRECIATION DEDUCTIONS. See **Internal Revenue Code**, 1; **Taxes**, 2.

DEPRIVATION OF PROPERTY. See **Constitutional Law**, II, 2.

DEPUTY MARSHALS. See **Federal Tort Claims Act**, 1–3.

DEROGATORY REPORTS. See **Constitutional Law**, VIII, 1–2; **Immunity**, 1–3.

DESEGREGATION. See **Attorneys' Fees**, 1; **Emergency School Aid Act of 1972.**

DESTRUCTIBLE EVIDENCE. See **Constitutional Law**, VI, 2; **Search and Seizure**, 2.

DETENTION OF SUSPECT. See **Constitutional Law**, VI, 2; **Search and Seizure**, 2.

DEVIATIONS IN POPULATION. See **Constitutional Law**, III, 1–3, 5–6; **Jurisdiction**, 7.

DISCIPLINARY FINES. See **Administrative Procedure**, 7; **National Labor Relations Act**, 2; **Unions.**

DISCOVERY. See **Constitutional Law**, II, 1; **Procedure**, 1.

DISCRETION. See **Attorneys' Fees**, 2; **Constitutional Law**, V; **Federal Communications Act**; **Labor-Management Reporting and Disclosure Act.**

DISCRIMINATION. See **Constitutional Law**, III, 4–7; **Jurisdiction**, 7.

DISMISSAL OF CHARGES. See **Constitutional Law**, VII; **Procedure**, 2.

DISTILLED SPIRITS. See **Constitutional Law**, X; **Taxes**, 4.

DISTRIBUTION OF REPORTS. See **Constitutional Law**, VIII, 1–2; **Immunity**, 1–3.

DISTRICT COURTS. See **Administrative Procedure**, 1–6; **Administrative Procedure Act**; **Attorneys' Fees**, 2; **Constitutional Law**, X; **Courts-Martial**; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Habeas Corpus**; **Injunctions**, 1–2; **Interstate Commerce Commission**; **Judicial Review**, 1; **Jurisdiction**, 1; **Labor-Management Reporting and Disclosure Act**; **National Environmental Policy Act**; **Procedure**, 3; **Standing to Sue**; **Taxes**, 4.

DISTRICTING. See **Constitutional Law**, III, 4–7; **Jurisdiction**, 7.

DISTRICT OF COLUMBIA. See **Constitutional Law**, VIII, 1–2; **Immunity**, 1–3.

DIVERSION OF WATER. See **Jurisdiction**, 4.

DOUBLE JEOPARDY. See **Constitutional Law**, II, 5; IV, 1; **Procedure**, 5, 7.

DRUG PRODUCTS. See **Administrative Procedure**, 1–6; **Evidence**, 1–2; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Judicial Review**, 1; **Jurisdiction**, 1; **Procedure**, 3.

DUE PROCESS. See **Constitutional Law**, II, 1–7; **Evidence**, 3–5; **Jurisdiction**, 5–6; **Probation**; **Procedure**, 1, 5–7.

ECONOMIC HARM. See **Administrative Procedure Act**; **Injunctions**, 1–2; **Jurisdiction**, 2; **National Environmental Policy Act**; **Standing to Sue.**

EDITORIAL ADVERTISEMENTS. See **Constitutional Law**, V; **Federal Communications Act.**

EFFECTIVE NEW DRUG APPLICATIONS. See **Administrative Procedure**, 1–6; **Evidence**, 1–2; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Judicial Review**, 1; **Jurisdiction**, 1; **Procedure**, 3.

EFFICACY OF NEW DRUGS. See **Administrative Procedure**, 1–6; **Evidence**, 1–2; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Judicial Review**, 1; **Jurisdiction**, 1; **Procedure**, 3.

ELECTION DISTRICTS. See **Constitutional Law**, III, 1–7; **Jurisdiction**, 7.

EMERGENCY RATE INCREASES. See **Administrative Procedure Act**; **Injunctions**, 1–2; **Jurisdiction**, 2; **National Environmental Policy Act**; **Standing to Sue.**

EMERGENCY SCHOOL AID ACT OF 1972. See also **Attorneys' Fees**, 1.

Successful litigants—Desegregation of Memphis schools—Denial of costs and attorneys' fees.—Since Court of Appeals' denial of costs and

EMERGENCY SCHOOL AID ACT OF 1972—Continued.
attorneys' fees under § 718 of the Act to petitioners, who were successful in litigation aimed at desegregation of Memphis public schools, was without stated reasons, this Court cannot determine whether the proper standard was correctly applied. Northcross v. Memphis Board of Education, p. 427.

EMPLOYEES. See **Administrative Procedure**, 7; **National Labor Relations Act**, 2; **Unions.**

EMPLOYEES OF SCHOOL SYSTEM. See **Constitutional Law**, VIII, 1–2; **Immunity**, 1–3.

EMPLOYEES OF THE GOVERNMENT. See **Federal Tort Claims Act**, 1–3.

EMPLOYER AND EMPLOYEES. See **Constitutional Law**, II, 2.

ENFORCEMENT OF FINES. See **Administrative Procedure**, 7; **National Labor Relations Act**, 2; **Unions.**

ENVIRONMENTAL DEFENSE FUND. See **Administrative Procedure Act; Injunctions**, 1–2; **Jurisdiction**, 2; **National Environmental Policy Act; Standing to Sue.**

ENVIRONMENTAL GROUPS. See **Administrative Procedure Act; Injunctions**, 1–2; **Jurisdiction**, 2; **National Environmental Policy Act; Standing to Sue.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law**, III, 1–7; **Jurisdiction**, 7.

EQUITABLE RELIEF. See **Jurisdiction**, 5–6.

EQUITY. See **Attorneys' Fees**, 2; **Labor-Management Reporting and Disclosure Act.**

ESTATES OF INDIANS. See **Federal-State Relations**, 2; **Indians**, 3; **Taxes**, 3.

ESTATE TAXES. See **Federal-State Relations**, 2; **Indians**, 3; **Taxes**, 3.

ETHNIC GROUPS. See **Constitutional Law**, III, 4, 7; **Jurisdiction**, 7.

EVALUATION OF NEW DRUGS. See **Administrative Procedure**, 1–6; **Evidence**, 1–2; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Judicial Review**, 1; **Jurisdiction**, 1; **Procedure**, 3.

EVANESCENT EVIDENCE. See **Constitutional Law**, VI, 2; **Search and Seizure**, 2.

EVIDENCE. See also **Administrative Procedure**, 1–6; **Constitutional Law**, II, 1, 6–7; VI, 1–2; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Probation**; **Procedure**, 1; **Search and Seizure**, 2.

1. *Federal Food, Drug, and Cosmetic Act—Substantial evidence—Hearings.*—Although a drug can be "generally recognized" by experts as effective for intended use within the meaning of the Act only when that expert consensus is founded upon "substantial evidence," any ruling on Lutrexin's new drug status is premature, and must await the outcome of the hearing on whether Hynson submitted "substantial evidence." Weinberger v. Hynson, Westcott & Dunning, p. 609.

2. *Federal Food, Drug and Cosmetic Act—Substantial evidence—Threshold burden.*—In No. 72–394, the Court of Appeals' holding that Hynson was entitled to a hearing on whether its submission of evidence satisfied its threshold burden of providing "substantial evidence" is affirmed. Weinberger v. Hynson, Westcott & Dunning, p. 609.

3. *Massing of evidence—Privilege against self-incrimination.*—Although the introduction of any evidence, direct or circumstantial, tending to implicate defendant in the alleged crime increases the pressure on him to testify, the mere massing of evidence against him cannot be regarded as a violation of his privilege against self-incrimination. Barnes v. United States, p. 837.

4. *Possession of stolen checks—Common-law inference—Reasonable-doubt standard.*—Here, where evidence established that petitioner possessed recently stolen Treasury checks payable to persons he did not know and it provided no plausible explanation for such possession consistent with innocence, the traditional common-law inference satisfies the reasonable-doubt standard, the most stringent standard applied by the Court in judging permissive criminal-law inferences, and, therefore, comports with due process. Barnes v. United States, p. 837.

5. *Statutory inference—Reasonable-doubt standard—More-likely-than-not standard.*—If statutory inference submitted to jury as sufficient to support conviction satisfies the reasonable-doubt standard (*i. e.*, the evidence necessary to invoke the inference is sufficient for rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process. Barnes v. United States, p. 837.

EXCLUSIVE JURISDICTION. See **Administrative Procedure Act; Constitutional Law,** X; **Injunctions,** 1–2; **Jurisdiction,** 2; **National Environmental Policy Act; Standing to Sue; Taxes,** 4.

EXEMPTIONS. See **Administrative Procedure,** 1–6; **Evidence,** 1–2; **Federal Food, Drug, and Cosmetic Act,** 1–6; **Judicial Review,** 1; **Jurisdiction,** 1; **Procedure,** 3.

EXHAUSTION OF REMEDIES. See **Administrative Procedure,** 1–6; **Evidence,** 1–2; **Federal Food, Drug, and Cosmetic Act,** 1–6; **Jurisdiction,** 1.

EXPERT PANELS. See **Administrative Procedure,** 1–6; **Evidence,** 1–2; **Federal Food, Drug, and Cosmetic Act,** 1–6; **Judicial Review,** 1; **Jurisdiction,** 1; **Procedure,** 3.

EXPULSION FROM UNION. See **Attorneys' Fees,** 2; **Labor-Management Reporting and Disclosure Act.**

FAIRNESS. See **Constitutional Law,** II, 1; **Procedure,** 1.

FAIRNESS DOCTRINE. See **Constitutional Law,** V; **Federal Communications Act.**

FEDERAL AGENCIES. See **Federal Tort Claims Act,** 1–3.

FEDERAL "COMMON LAW." See **Federal-State Relations,** 1; **Public Lands.**

FEDERAL COMMUNICATIONS ACT. See also **Constitutional Law,** V.

Radio broadcasters—Public issues—Paid editorial advertisements.—Neither the Act nor the First Amendment requires broadcasters to accept paid editorial advertisements. Columbia Broadcasting v. Democratic Comm., p. 94.

FEDERAL COMMUNICATIONS COMMISSION. See **Constitutional Law,** V; **Federal Communications Act.**

FEDERAL COURTS. See **Federal-State Relations,** 1; **Public Lands.**

FEDERAL FOOD, DRUG, AND COSMETIC ACT. See also **Administrative Procedure,** 1–6; **Evidence,** 1–2; **Judicial Review,** 1; **Jurisdiction,** 1; **Procedure,** 3.

1. *Exemptions—"Grandfather" clause—New drug applications (NDA's).*—The congressional purpose was to exempt only those drugs that had never been subject to the new drug regulation, and therefore any drug for which an NDA had once been effective does not fall

FEDERAL FOOD, DRUG, AND COSMETIC ACT—Continued.
within the exempt category. USV Pharmaceutical Corp. v. Weinberger, p. 655.

2. *Food and Drug Administration—New drugs—Scientific inquiry.*—The reach of scientific inquiry under both § 505 (d) and § 201 (p) of the Act is the same, and it is implicit in the regulatory scheme that the FDA has jurisdiction to decide with administrative finality, subject to judicial review, the "new drug" status of individual drugs or classes of drugs. Weinberger v. Bentex Pharmaceuticals, Inc., p. 645.

3. *Grandfather provisions—New drug applications.*—Lutrexin is not exempt under the "grandfather" provisions of the 1962 Amendments to the Act, as held by the FDA and the Court of Appeals, and their construction accords with the legislative history which suggests that the exemption is afforded only for drugs that never had been subject to new drug regulation. Weinberger v. Hynson, Westcott & Dunning, p. 609.

4. *"Me-too" drugs—Effective new drug applications.*—"Any drug" is used in § 107 (c) (4) in the generic sense, which means that the "me-too's" whether the products of the same or of different manufacturers "covered" by an "effective" NDA are not exempt from the efficacy requirement of § 201 (p). USV Pharmaceutical Corp. v. Weinberger, p. 655.

5. *Prescription drugs—Efficacy requirements.*—Prescription drugs on the market are subject to the 1962 efficacy requirements, for if the 1962 amendments are to be comprehensively meaningful, § 107 (c) (4) cannot be read so as to provide a loophole to permit the marketing of drugs previously subject to new drug regulation without demonstrating by the new statutory standards that they have the claimed efficacy. USV Pharmaceutical Corp. v. Weinberger, p. 655.

6. *Sanctions—Not a dual administrative-judicial system.*—While the Act provides FDA with sanctions, such as civil injunction proceedings, criminal penalties, and *in rem* seizure and condemnation, to enforce the prohibition against sale in commerce of any article in violation of § 505, the Act does not create a dual system, one administrative and the other judicial. CIBA Corp. v. Weinberger, p. 640.

FEDERAL INCOME TAXES. See **Internal Revenue Code**, 1–2; **Taxes**, 1–2.

FEDERAL INSTRUMENTALITIES. See **Constitutional Law**, X; **Taxes**, 4.

FEDERAL PRISONERS. See **Federal Tort Claims Act**, 1–3.

FEDERAL REGULATORY PROGRAMS. See **Federal-State Relations,** 1; **Public Lands.**

FEDERAL RULES OF CRIMINAL PROCEDURE. See **Indians,** 2; **Jurisdiction,** 3; **Procedure,** 6.

FEDERAL-STATE RELATIONS. See also **Constitutional Law,** I; IX; X; **Copyrights,** 1–3; **Indians,** 1, 3; **Public Lands; Taxes,** 4.

1. *Federal lands—Mineral reservations—Subsequent Louisiana statute.*—Under settled principles governing the choice of law by federal courts, Louisiana's Act 315 of 1940 does not apply to the mineral reservations agreed to by the parties in 1937 and 1939. As it is clear that Act 315 does not apply here, it is not necessary to choose between "borrowing" some residual state rule of interpretation or formulating an independent federal "common law" rule; neither rule is the law of Louisiana, yet either rule resolves this dispute in the Government's favor. United States v. Little Lake Misere Land Co., p. 580.

2. *Oklahoma estate tax—United States as trustee—Reliance on Supreme Court decision.*—United States did not breach its fiduciary duty as trustee of Indian property by paying Oklahoma estate tax assessed against estate of deceased, a restricted Osage Indian, in reliance on *West* v. *Oklahoma,* 334 U. S. 717, which had upheld the validity of tax as applied to the same kind of estate. United States v. Mason, p. 391.

FEDERAL TORT CLAIMS ACT.

1. *Federal prisoner—Confinement in county jail—Suicide.*—Court of Appeals correctly concluded that the deputy marshal had no authority to control the activities of the sheriff's employees and that the county jail was a "contractor," not a "Federal agency," within the meaning of the Act; and the statutory authorization for housing federal prisoners in state facilities clearly contemplated that day-to-day operation of the contractor's facilities was to be in the contractor's, not the Government's, hands. Logue v. United States, p. 521.

2. *Federal prisoner in county jail—Sheriff's employees—Acting on behalf of federal agency.*—Petitioners' alternative contention that even though sheriff's employees might not be "employees" of a federal agency, they might nonetheless be "acting on behalf of a federal agency in an official capacity" and thus "employee[s] of the Government" within the meaning of the Act, is not consistent with the legislative purposes of the Act. Logue v. United States, p. 521.

3. *Federal prisoner in county jail—Suicide—Negligence of federal deputy marshal.*—Court of Appeals, not having given consideration

FEDERAL TORT CLAIMS ACT—Continued.
to the question of the deputy marshal's negligence apart from the other issues, should address itself to that question on remand. Logue v. United States, p. 521.

FEE TITLES. See **Federal-State Relations**, 1; **Public Lands.**

FELONIES. See **Internal Revenue Code**, 2; **Taxes**, 1.

FIDUCIARY DUTY. See **Federal-State Relations**, 2; **Indians**, 3; **Taxes**, 3.

FIFTH AMENDMENT. See **Constitutional Law**, IV, 1–2; **Evidence**, 3–5.

FINES. See **Administrative Procedure**, 7; **National Labor Relations Act**, 2; **Unions.**

FINGERNAIL SCRAPINGS. See **Constitutional Law**, VI, 2; **Search and Seizure**, 2.

FIRST AMENDMENT. See **Attorneys' Fees**, 2; **Constitutional Law**, V; **Federal Communications Act**; **Labor-Management Reporting and Disclosure Act.**

FISHING RIGHTS. See **Indians**, 1.

FOOD AND DRUG ADMINISTRATION. See **Administrative Procedure**, 1–6; **Evidence**, 1–2; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Judicial Review**, 1; **Jurisdiction**, 1; **Procedure**, 3.

FORFEITURE PROCEEDINGS. See **Indians**, 1.

FORGING AND UTTERING. See **Constitutional Law**, IV, 2; **Evidence**, 3–5.

FOURTEENTH AMENDMENT. See **Constitutional Law**, II, 1, 5, 7; III, 1–3, 5–6; IV, 1; VI, 1–2; **Jurisdiction**, 5–6; **Probation**; **Procedure**, 1, 5, 7; **Search and Seizure**, 1.

FOURTH AMENDMENT. See **Constitutional Law**, VI, 1–2; **Search and Seizure**, 1–2.

FRAUDULENT RETURNS. See **Internal Revenue Code**, 2; **Taxes**, 1.

FREEDOM OF SPEECH. See **Attorneys' Fees**, 2; **Constitutional Law**, V; **Federal Communications Act**; **Labor-Management Reporting and Disclosure Act.**

FREIGHT RATE INCREASES. See **Administrative Procedure Act**; **Injunctions**, 1–2; **Jurisdiction**, 2; **National Environmental Policy Act**; **Standing to Sue.**

FREIGHT RATES. See **Interstate Commerce Commission**; **Judicial Review**, 2; **Procedure**, 4

FRUIT SKIN EXTRACTS. See **Federal Food, Drug, and Cosmetic Act,** 1, 4–5.

FUNDAMENTAL FAIRNESS. See **Constitutional Law,** II, 1; **Procedure,** 1.

GAME WARDENS. See **Indians,** 1.

GENERIC DRUGS. See **Federal Food, Drug, and Cosmetic Act,** 1, 4–5.

GEORGIA. See **Constitutional Law,** IV, 1; **Procedure,** 5.

GILL NETS. See **Indians,** 1.

GOVERNMENT AGENTS. See **Federal Tort Claims Act,** 1–3.

GOVERNMENT CONTRACTORS. See **Federal Tort Claims Act,** 1–3.

GOVERNMENT LAND OWNERSHIP. See **Federal-State Relations,** 1; **Public Lands.**

GOVERNMENT OFFICIALS. See **Constitutional Law,** VIII, 1–2; **Immunity,** 1–3.

GOVERNMENT PRINTING OFFICE. See **Constitutional Law,** VIII, 1–2; **Immunity,** 1–3.

GOVERNMENT SUBSIDIES. See **Internal Revenue Code,** 1; **Taxes,** 2.

GRAIN INSPECTIONS. See **Interstate Commerce Commission; Judicial Review,** 2; **Procedure,** 4.

GRANDFATHER CLAUSES. See **Administrative Procedure,** 1–6; **Evidence,** 1–2; **Federal Food, Drug, and Cosmetic Act,** 1–6; **Judicial Review,** 1; **Jurisdiction,** 1; **Procedure,** 3.

GREATER SENTENCES. See **Constitutional Law,** II, 5; IV, 1; **Procedure,** 5, 7.

GUIDELINES. See **Administrative Procedure,** 1–6; **Evidence,** 1–2; **Federal Food, Drug, and Cosmetic Act,** 1–6; **Judicial Review,** 1; **Jurisdiction,** 1; **Procedure,** 3.

HABEAS CORPUS. See also **Constitutional Law,** IV, 1; **Courts-Martial; Procedure,** 5.

Class actions—Unnamed class members outside District—Worldwide basis.—Question of District Court's authority to grant habeas corpus relief for unnamed class members outside District and/or on worldwide basis is so novel that relief should be granted only after full argument. Henry v. Warner (DOUGLAS, J., in chambers), p. 1201.

HARM TO ENVIRONMENT. See **Administrative Procedure Act; Injunctions,** 1–2; **Jurisdiction,** 2; **National Environmental Policy Act; Standing to Sue.**

HEARINGS. See **Administrative Procedure,** 1–6; **Evidence,** 1–2; **Federal Food, Drug, and Cosmetic Act,** 1–6; **Judicial Review,** 1; **Jurisdiction,** 1; **Procedure,** 3.

HEMATOLOGIC DISORDERS. See **Federal Food, Drug, and Cosmetic Act,** 1, 4–5.

HIGHER SENTENCES. See **Constitutional Law,** II, 5; IV, 1; **Procedure,** 5, 7.

HIGHWAY-RAILROAD INTERSECTIONS. See **Internal Revenue Code,** 1; **Taxes,** 2.

HOOPA VALLEY RESERVATION. See **Indians,** 1.

HOUSE OF REPRESENTATIVES. See **Constitutional Law,** VIII, 1–2; **Immunity,** 1–3.

HOUSING OF FEDERAL PRISONERS. See **Federal Tort Claims Act,** 1–3.

IMMUNITY. See also **Constitutional Law,** VIII, 1–2.

1. *Public officials—Distribution of congressional report—Legislative functions.*—Public Printer and Superintendent of Documents are protected by doctrine of official immunity enunciated in *Barr* v. *Matteo,* 360 U. S. 564, for publishing and distributing the report only to the extent that they served legitimate legislative functions in doing so, and the Court of Appeals erred in holding that their immunity extended beyond that limit. Doe v. McMillan, p. 306.

2. *Speech or Debate Clause—Legislative report—Congressional staff.*—Congressional committee members, members of their staff, consultant, and investigator are absolutely immune under the Speech or Debate Clause insofar as they engaged in legislative acts of compiling report, referring it to the House, or voting for its publication. Doe v. McMillan, p. 306.

3. *Speech or Debate Clause—Public distribution of congressional reports.*—Clause does not afford absolute immunity from private suit to persons who, with authorization from Congress, perform function of publicly distributing materials that allegedly infringe upon the rights of individuals. Court of Appeals erred in holding that respondents who (except for committee members and personnel) were charged with public distribution were protected by the Clause. Doe v. McMillan, p. 306.

IMPORTATION OF LIQUOR. See **Constitutional Law**, X; **Taxes**, 4.

IMPRESCRIPTIBILITY. See **Federal-State Relations**, 1; **Public Lands.**

IMPROVEMENTS TO HIGHWAY SYSTEM. See **Internal Revenue Code**, 1; **Taxes**, 2.

INCOME TAXES. See **Internal Revenue Code**, 1–2; **Taxes**, 1–2.

INCREASED RATES. See **Administrative Procedure Act; Injunctions**, 1–2; **Jurisdiction**, 2; **National Environmental Policy Act; Standing to Sue.**

INCREASED SENTENCES. See **Constitutional Law**, II, 5; IV, 1; **Procedure**, 5, 7.

INCUMBENTS. See **Constitutional Law**, III, 1–3.

INDIAN COUNTRY. See **Indians**, 1.

INDIAN RESERVATIONS. See **Indians**, 1–2; **Jurisdiction**, 3; **Procedure**, 6.

INDIANS. See also **Federal-State Relations**, 2; **Jurisdiction**, 3; **Procedure**, 6; **Taxes**, 3.

1. *Fishing rights—Termination of reservation—Klamath River Reservation.*—The Klamath River Reservation was not terminated by the Act of June 17, 1892, and the land within the reservation boundaries is still Indian country, within the meaning of 18 U. S. C. § 1151. Mattz v. Arnett, p. 481.

2. *Major Crimes Act of 1885—Lesser included offenses—Jury instructions.*—An Indian prosecuted in federal court under the Act is entitled to a jury instruction on lesser included offenses, if the facts warrant. Such an instruction would not expand the reach of the Act or permit the Government to infringe the residual jurisdiction of the Indian tribes by bringing in federal courts prosecutions not authorized by statute. Keeble v. United States, p. 205.

3. *Oklahoma estate tax—Payment by United States as trustee—Reliance on Supreme Court decision.*—United States did not breach its fiduciary duty as trustee of Indian property by paying Oklahoma estate tax assessed against estate of deceased, a restricted Osage Indian, in reliance on *West* v. *Oklahoma*, 334 U. S. 717, which had upheld the validity of tax as applied to the same kind of estate. United States v. Mason, p. 391.

INFERENCES. See **Constitutional Law**, II, 3; **Evidence**, 3–5.

INJUNCTIONS. See also **Administrative Procedure,** 2; **Administrative Procedure Act; Constitutional Law,** III, 4, 7; **Federal Food, Drug, and Cosmetic Act,** 6; **Interstate Commerce Commission; Judicial Review,** 2; **Jurisdiction,** 2, 7; **National Environmental Policy Act; Procedure,** 3–4; **Standing to Sue.**

1. *Jurisdiction—Interstate Commerce Commission—Suspension of rates.—Arrow Transportation Co.* v. *Southern R. Co.,* 372 U. S. 658, held that Congress in § 15 (7) of the Interstate Commerce Act had vested exclusive jurisdiction in the ICC to suspend rates pending its final decision on their lawfulness and had deliberately extinguished judicial power to grant such relief; and the factual distinctions between the instant case and *Arrow Transportation* are inconsequential. United States v. SCRAP, p. 669.

2. *National Environmental Policy Act—Noncompliance by ICC—Repeal by implication.*—Alleged noncompliance by ICC with the Act did not give the District Court authority to grant the injunction, as the Act was not intended to repeal by implication any other statute, and the policies identified in *Arrow Transportation Co.* v. *Southern R. Co.,* 372 U. S. 658, as the basis for § 15 (7) of the Interstate Commerce Act would be substantially undermined if the courts were found to have suspension powers simply because of noncompliance with NEPA. United States v. SCRAP, p. 669.

INSPECTION OF GRAIN. See **Interstate Commerce Commission; Judicial Review,** 2; **Procedure,** 4.

IN-STATE TUITION RATES. See **Constitutional Law,** II, 6.

INSTRUCTIONS TO JURY. See **Constitutional Law,** IV, 2; **Evidence,** 3–5; **Indians,** 2; **Internal Revenue Code,** 2; **Jurisdiction,** 3; **Procedure,** 6; **Taxes,** 1.

INTERESTS OF UNION MEMBERS. See **Attorneys' Fees,** 2; **Labor-Management Reporting and Disclosure Act.**

INTERIOR DEPARTMENT. See **Indians,** 1.

INTERNAL REVENUE CODE. See also **Taxes,** 1–2.

1. *Depreciation of Government's cost in assets—Highway-railroad improvements—Income taxes.*—Governmental subsidies did not constitute contributions to respondent's capital within meaning of § 113 (a)(8) of Internal Revenue Code of 1939; the assets in question have a zero basis; and respondent cannot claim a depreciation deduction with respect thereto. United States v. Chicago, B. & Q. R. Co., p. 401.

2. *"Willfully"—Lesser included offenses—Income taxes.*—Word "willfully" has same meaning in 26 U. S. C. §§ 7206 (1) and 7207,

INTERNAL REVENUE CODE—Continued.

connoting voluntary, intentional violation of known legal duty, and the distinction between the statutes is found in the additional misconduct that is essential to the violation of the felony provision; hence, the District Court properly refused the requested lesser-included-offense instruction based on respondent's erroneous contention that word "willfully" in misdemeanor statute implied less scienter than same word in felony statute. United States v. Bishop, p. 346.

INTERNAL UNION AFFAIRS. See **Administrative Procedure,** 7; **National Labor Relations Act,** 2; **Unions.**

INTERSECTIONS. See **Internal Revenue Code,** 1; **Taxes,** 2.

INTERSTATE COMMERCE ACT. See **Administrative Procedure Act; Injunctions,** 1–2; **Jurisdiction,** 2; **National Environmental Policy Act; Standing to Sue.**

INTERSTATE COMMERCE COMMISSION. See also **Administrative Procedure Act; Injunctions,** 1–2; **Judicial Review,** 2; **Jurisdiction,** 2; **National Environmental Policy Act; Procedure,** 4; **Standing to Sue.**

Approval of separate charges for inspection of grain in transit—Judicial review.—District Court's action suspending separate in-transit charges for grain inspection approved by the ICC, and remanding the case to the ICC, is affirmed as to the remand and reversed as to the injunction suspending the proposed charges. Atchison, T. & S. F. R. Co. v. Wichita Bd. of Trade, p. 800.

INTERVENTION. See **Jurisdiction,** 5–6.

IN-TRANSIT CHARGES. See **Interstate Commerce Commission; Judicial Review,** 2; **Procedure,** 4.

INVASION OF PRIVACY. See **Constitutional Law,** VIII, 1–2; **Immunity,** 1–3.

INVESTIGATORS. See **Constitutional Law,** VIII, 1–2; **Immunity,** 1–3.

INVIDIOUS DISCRIMINATION. See **Constitutional Law,** III, 4–7; **Jurisdiction,** 7.

IRREBUTTABLE PRESUMPTIONS. See **Constitutional Law,** II, 6.

IRRIGATION WATER. See **Jurisdiction,** 4.

JOURNALISTIC DISCRETION. See **Constitutional Law,** V; **Federal Communications Act.**

JUDGES. See **Constitutional Law**, II, 5, 7; **Probation**; **Procedure**, 7.

JUDGMENTS OF CONDEMNATION. See **Federal-State Relations**, 1; **Public Lands.**

JUDICIAL POWER. See **Administrative Procedure Act**; **Injunctions**, 1–2; **Jurisdiction**, 2; **National Environmental Policy Act**; **Standing to Sue.**

JUDICIAL REVIEW. See also **Administrative Procedure**, 1–6; **Constitutional Law**, III, 4, 7; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Interstate Commerce Commission**; **Jurisdiction**, 1, 7; **Procedure**, 3–4.

1. *Federal Food, Drug, and Cosmetic Act—New drug applications—Food and Drug Administration.*—While an FDA order denying a new drug application and withdrawing one is reviewable by the Court of Appeals under § 505 (h) of the Act, an order declaring a "new drug" status under § 201 (p) is reviewable under the Administrative Procedure Act by the District Court. Weinberger v. Bentex Pharmaceuticals, Inc., p. 645.

2. *ICC approval of charges—Injunctions—Remand.*—District Court's action suspending separate in-transit charges for grain inspection approved by the ICC, and remanding the case to the ICC, is affirmed as to the remand and reversed as to the injunction suspending the proposed charges. Atchison, T. & S. F. R. Co. v. Wichita Bd. of Trade, p. 800.

JURIES. See **Constitutional Law**, IV, 1; **Procedure**, 5.

JURISDICTION. See also **Administrative Procedure**, 1–7; **Administrative Procedure Act**; **Attorneys' Fees**, 2; **Constitutional Law**, III, 4, 7; X; **Courts-Martial**; **Evidence**, 1–2; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Habeas Corpus**; **Indians**, 1–2; **Injunctions**, 1–2; **Interstate Commerce Commission**; **Judicial Review**, 1–2; **Labor-Management Reporting and Disclosure Act**; **National Environmental Policy Act**; **National Labor Relations Act**, 2; **Procedure**, 3–4, 6; **Standing to Sue**; **Taxes**, 4; **Unions.**

1. *Food and Drug Administration—Primary jurisdiction—Judicial review.*—The heart of the statutory procedure is the grant of primary jurisdiction to FDA, subject to judicial review when administrative procedures are exhausted. Weinberger v. Hynson, Westcott & Dunning, p. 609.

2. *Injunctions—Interstate Commerce Commission—Suspension of rates.—Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658,

JURISDICTION—Continued.

held that Congress in § 15 (7) of the Interstate Commerce Act had vested exclusive jurisdiction in the ICC to suspend rates pending its final decision on their lawfulness and had deliberately extinguished judicial power to grant such relief; and the factual distinctions between the instant case and *Arrow Transportation* are inconsequential. United States v. SCRAP, p. 669.

3. *Major Crimes Act of 1885—Indian tribes—Lesser included offenses.*—An Indian prosecuted in federal court under the Act is entitled to a jury instruction on lesser included offenses, if the facts warrant. Such an instruction would not expand the reach of the Act or permit the Government to infringe the residual jurisdiction of the Indian tribes by bringing in federal courts prosecutions not authorized by statute. Keeble v. United States, p. 205.

4. *Original jurisdiction—Exclusive jurisdiction—Dispute between United States and two States.*—Motion to file bill of complaint is denied, without prejudice to refiling it if posture of litigation should change in manner that presents more substantial basis for exercise of original jurisdiction. There being no dispute between California and Nevada, the dispute is between the United States and two States, over which the Court has original but not exclusive jurisdiction under 28 U. S. C. § 1251 (b)(2). This Court seeks to exercise original jurisdiction sparingly, especially where plaintiff has another adequate forum in which to settle his claim. United States v. Nevada, p. 534.

5. *Suit against cities—Equitable relief—City not a "person."*—A city is not a "person" under 42 U. S. C. § 1983 where equitable relief is sought, any more than it is where damages are sought, and the District Court erred in concluding that it had jurisdiction over the complaints under 28 U. S. C. § 1343 since only the two municipalities were named as defendants. City of Kenosha v. Bruno, p. 507.

6. *Suit against cities—Intervention by State Attorney General—28 U. S. C. § 1331.*—In this action seeking declaratory and injunctive relief against two cities for refusal to renew liquor licenses, the District Court on remand should consider the jurisdictional questions presented by State Attorney General's intervention and the availability of 28 U. S. C. § 1331 jurisdiction, as well as decisions of this Court in *Board of Regents* v. *Roth*, 408 U. S. 464, and *Perry* v. *Sindermann*, 408 U. S. 593, which are germane to the due process issue, and *California* v. *LaRue*, 409 U. S. 109, dealing with broad state authority over liquor distribution. City of Kenosha v. Bruno, p. 507.

JURISDICTION—Continued.

7. *Supreme Court—Appeal from injunction order—Texas legislative apportionment.*—This Court has jurisdiction under 28 U. S. C. § 1253 to consider the appeal from the injunction order applicable to Bexar County and Dallas County districting, since the three-judge court had been properly convened, and this Court can review the declaratory part of the judgment below. White v. Regester, p. 755.

JURY DUTY. See **Constitutional Law**, II, 2.

JURY INSTRUCTIONS. See **Constitutional Law**, IV, 2; **Evidence**, 3–5; **Indians**, 2; **Internal Revenue Code**, 2; **Jurisdiction**, 3; **Procedure**, 6; **Taxes**, 1.

KENOSHA, WISCONSIN. See **Jurisdiction**, 5–6.

KLAMATH RIVER RESERVATION. See **Indians**, 1.

KNOWLEDGE OF JURY. See **Constitutional Law**, IV, 1; **Procedure**, 5.

KNOWLEDGE OF RIGHT. See **Constitutional Law**, VI, 1; **Search and Seizure**, 1.

KNOWLEDGE THAT CHECKS WERE STOLEN. See **Constitutional Law**, IV, 2; **Evidence**, 3–5.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT. See also **Attorneys' Fees**, 2.

Reinstatement of union member—Legal fees—Equitable powers of trial court.—Respondent's suit under § 102 vindicated not only his own rights of free speech guaranteed by the statute but furthered the interests of the union and its members as well. As a result, the award of attorneys' fees under these circumstances comported with the trial court's inherent equitable power of making such an award whenever "overriding considerations indicate the need for such recovery." Hall v. Cole, p. 1.

LABOR UNIONS. See **Administrative Procedure**, 7; **Attorneys' Fees**, 2; **Labor-Management Reporting and Disclosure Act**; **National Labor Relations Act**, 2; **Unions.**

LAND ACQUISITIONS. See **Federal-State Relations**, 1; **Public Lands.**

LANDRUM-GRIFFIN ACT. See **Attorneys' Fees**, 2; **Labor-Management Reporting and Disclosure Act.**

LAWYERS' FEES. See **Attorneys' Fees**, 1; **Emergency School Aid Act of 1972**; **Labor-Management Reporting and Disclosure Act.**

LEGAL FEES. See **Attorneys' Fees; Emergency School Aid Act of 1972; Labor-Management Reporting and Disclosure Act.**

LEGISLATIVE APPORTIONMENT. See **Constitutional Law,** III, 1–7; **Jurisdiction,** 7.

LEGISLATIVE EMPLOYEES. See **Constitutional Law,** VIII, 1–2; **Immunity,** 1–3.

LESSER INCLUDED OFFENSES. See **Indians,** 2; **Internal Revenue Code,** 2; **Jurisdiction,** 3; **Procedure,** 6; **Taxes,** 1.

LEVEL OF WATER. See **Jurisdiction,** 4.

LICENSEES. See **Constitutional Law,** V; **Federal Communications Act.**

LICENSES. See **Jurisdiction,** 5–6.

LINE-HAUL RATES. See **Interstate Commerce Commission; Judicial Review,** 2; **Procedure,** 4.

LIQUOR LICENSES. See **Jurisdiction,** 5–6.

LIQUOR PURCHASES. See **Constitutional Law,** X; **Taxes,** 4.

LITIGATION EXPENSES. See **Attorneys' Fees,** 1; **Emergency School Aid Act of 1972.**

LOUISIANA. See **Federal-State Relations,** 1; **Public Lands.**

LUTREXIN. See **Administrative Procedure,** 1–2; **Evidence,** 1–2; **Federal Food, Drug, and Cosmetic Act,** 3; **Jurisdiction,** 1.

MAIL THEFT. See **Constitutional Law,** IV, 2; **Evidence,** 3–5.

MAINTENANCE-OF-MEMBERSHIP CLAUSES. See **Administrative Procedure,** 7; **National Labor Relations Act,** 2; **Unions.**

MAJOR CRIMES ACT OF 1885. See **Indians,** 2; **Jurisdiction,** 3; **Procedure,** 6.

MAJOR POLITICAL PARTIES. See **Constitutional Law,** III, 5–6.

MALICIOUS VILIFICATION. See **Attorneys' Fees,** 2; **Labor-Management Reporting and Disclosure Act.**

MANSLAUGHTER. See **Constitutional Law,** II, 7; **Probation.**

MARKETING OF DRUGS. See **Administrative Procedure,** 1–6; **Evidence,** 1–2; **Federal Food, Drug, and Cosmetic Act,** 1–6; **Judicial Review,** 1; **Jurisdiction,** 1; **Procedure,** 3.

MARKUPS ON LIQUOR. See **Constitutional Law,** X; **Taxes,** 4.

MARRIED STUDENTS. See **Constitutional Law,** II, 6.

MARSHALS. See **Federal Tort Claims Act**, 1–3.

MASSING OF EVIDENCE. See **Constitutional Law**, IV, 2; **Evidence**, 3–5.

MATHEMATICAL EQUALITY. See **Constitutional Law**, III, 1–7; **Jurisdiction**, 7.

MEMBERSHIP IN UNION. See **Administrative Procedure**, 7; **Attorneys' Fees**, 2; **Labor-Management Reporting and Disclosure Act**; **National Labor Relations Act**, 2; **Unions.**

MEMPHIS. See **Attorneys' Fees**, 1; **Emergency School Aid Act of 1972.**

METABOLIC DISORDERS. See **Federal Food, Drug, and Cosmetic Act**, 1, 4–5.

"ME-TOO" DRUGS. See **Administrative Procedure**, 1–6; **Evidence**, 1–2; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Judicial Review**, 1; **Jurisdiction**, 1; **Procedure**, 3.

MEXICAN-AMERICANS. See **Constitutional Law**, III, 4, 7; **Jurisdiction**, 7.

MICHIGAN. See **Constitutional Law**, II, 5; **Procedure**, 7.

MIGRATORY BIRD CONSERVATION ACT. See **Federal-State Relations**, 1; **Public Lands.**

MILITARY BASES. See **Constitutional Law**, X; **Taxes**, 4.

MILITARY TRIALS. See **Courts-Martial**; **Habeas Corpus.**

MINERAL RIGHTS. See **Federal-State Relations**, 1; **Public Lands.**

MINOR DEVIATIONS. See **Constitutional Law**, III, 5–6.

MISDEMEANORS. See **Internal Revenue Code**, 2; **Taxes**, 1.

MISSISSIPPI. See **Constitutional Law**, X; **Taxes**, 4

MISSOURI. See **Constitutional Law**, II, 7; **Probation.**

MORE-LIKELY-THAN-NOT STANDARD. See **Constitutional Law**, IV, 2; **Evidence**, 3–5.

MOTION TO FILE BILL OF COMPLAINT. See **Jurisdiction**, 4.

MOTION TO VACATE STAY. See **Courts-Martial**; **Habeas Corpus.**

MULTIMEMBER DISTRICTS. See **Constitutional Law**, III, 4, 7; **Jurisdiction**, 7.

MUNICIPALITIES. See **Jurisdiction**, 5–6.

MURDER. See **Constitutional Law**, VI, 2; **Search and Seizure**, 2.

NATIONAL ACADEMY OF SCIENCES. See **Administrative Procedure**, 1–6; **Evidence**, 1–2; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Judicial Review**, 1; **Jurisdiction**, 1; **Procedure**, 3.

NATIONAL ENVIRONMENTAL POLICY ACT. See also **Administrative Procedure Act**; **Injunctions**, 1–2; **Jurisdiction**, 2; **Standing to Sue.**

Noncompliance by Interstate Commerce Commission—Injunctions—Repeal by implication.—Alleged noncompliance by ICC with the Act did not give the District Court authority to grant the injunction, as the Act was not intended to repeal by implication any other statute, and the policies identified in *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658, as the basis for § 15 (7) of the Interstate Commerce Act would be substantially undermined if the courts were found to have suspension powers simply because of noncompliance with NEPA. United States v. SCRAP, p. 669.

NATIONAL LABOR RELATIONS ACT. See also **Administrative Procedure**, 7; **Unions.**

1. *Unfair labor practice—Court enforcement of fines—Resignations from union.*—Where the Union's constitution and bylaws are silent on subject of voluntary resignation from the Union, Union committed an unfair labor practice when it sought court enforcement of fines imposed for strikebreaking activities by employees who had resigned from the Union, even though Union constitution expressly prohibited members from strikebreaking. Machinists & Aerospace Workers v. NLRB, p. 84.

2. *Unfair labor practice—Disciplinary fines—Reasonableness.*—Adjudication by NLRB under § 8 (b) (1) (A) of the Act of an unfair labor practice allegedly committed by a union does not include authority to determine whether the amount of a disciplinary fine levied by the union against a member is reasonable, the issue being one of internal union affairs over which the NLRB exercises no jurisdiction. NLRB v. Boeing Co., p. 67.

NATIONAL LABOR RELATIONS BOARD. See **Administrative Procedure**, 7; **National Labor Relations Act**, 2; **Unions.**

NATIONAL RESEARCH COUNCIL. See **Administrative Procedure**, 1–6; **Evidence**, 1–2; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Judicial Review**, 1; **Jurisdiction**, 1; **Procedure**, 3.

NATIONAL TRANSPORTATION POLICY. See **Interstate Commerce Commission**; **Judicial Review**, 2; **Procedure**, 4

NATURAL RESOURCES. See **Administrative Procedure Act**; **Injunctions**, 1–2; **Jurisdiction**, 2; **National Environmental Policy Act**; **Standing to Sue.**

NEGLIGENCE. See **Federal Tort Claims Act**, 1–3.

NEGROES. See **Constitutional Law**, III, 4, 7; **Jurisdiction**, 7.

NEVADA. See **Jurisdiction**, 4.

NEW DRUG APPLICATIONS. See **Administrative Procedure**, 1–6; **Evidence**, 1–2; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Judicial Review**, 1; **Jurisdiction**, 1; **Procedure**, 3.

NEW DRUGS. See **Administrative Procedure**, 1–6; **Evidence**, 1–2; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Judicial Review**, 1; **Jurisdiction**, 1; **Procedure**, 3.

NEWSPAPER EMPLOYEES. See **Constitutional Law**, II, 2.

NONRESIDENTS. See **Constitutional Law**, II, 6.

NONSHAREHOLDERS. See **Internal Revenue Code**, 1; **Taxes**, 2.

NOTICE. See **Administrative Procedure Act**; **Constitutional Law**, II, 1; **Injunctions**, 1–2; **Jurisdiction**, 2; **National Environmental Policy Act**; **Procedure**, 1; **Standing to Sue.**

NOTICE AND HEARING. See **Administrative Procedure**, 1–6; **Evidence**, 1–2; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Judicial Review**, 1; **Jurisdiction**, 1; **Procedure**, 3.

NOVEL QUESTIONS. See **Courts-Martial**; **Habeas Corpus.**

NUDE DANCING. See **Jurisdiction**, 5–6.

OBJECTIONABLE MATERIALS. See **Constitutional Law**, VIII, 1–2; **Immunity**, 1–3.

OBLIGATIONS OF BROADCASTERS. See **Constitutional Law**, V; **Federal Communications Act.**

OFFENSES. See **Indians**, 2; **Jurisdiction**, 3; **Procedure**, 6.

OFFICERS' CLUB. See **Constitutional Law**, X; **Taxes**, 4.

OFFICIAL IMMUNITY. See **Constitutional Law**, VIII, 1–2; **Immunity**, 1–3.

OKLAHOMA. See **Federal-State Relations**, 2; **Indians**, 3; **Taxes**, 3.

OREGON. See **Constitutional Law**, II, 1; **Procedure**, 1.

ORIGINAL JURISDICTION. See **Jurisdiction**, 4.

OSAGE ALLOTMENT ACT. See **Federal-State Relations**, 2; **Indians**, 3; **Taxes**, 3.

OUT-OF-STATE TUITION RATES. See **Constitutional Law**, II, 6.

OVERPAYMENTS. See **Internal Revenue Code**, 1; **Taxes**, 2.

OWNERSHIP OF LAND. See **Federal-State Relations**, 1; **Public Lands.**

PAID EDITORIAL ADVERTISEMENTS. See **Constitutional Law**, V; **Federal Communications Act.**

PAIUTE INDIANS. See **Jurisdiction**, 4.

PARENTS. See **Constitutional Law**, VIII, 1–2; **Immunity**, 1–3.

PAYMENT OF ESTATE TAXES. See **Federal-State Relations**, 2; **Indians**, 3; **Taxes**, 3.

PENALTIES. See **Administrative Procedure**, 7; **National Labor Relations Act**, 2; **Unions.**

PENTYLENETETRAZOL DRUGS. See **Administrative Procedure**, 4–6; **Federal Food, Drug, and Cosmetic Act**, 2; **Judicial Review**, 1.

"PERSONS." See **Jurisdiction**, 5–6.

PERSONS AGGRIEVED. See **Administrative Procedure Act; Injunctions**, 1–2; **Jurisdiction**, 2; **National Environmental Policy Act; Standing to Sue.**

PHARMACEUTICALS. See **Administrative Procedure**, 1–6; **Evidence**, 1–2; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Judicial Review**, 1; **Jurisdiction**, 1; **Procedure**, 3.

PHONOGRAPH RECORDS. See **Constitutional Law**, I; IX; **Copyrights**, 1–3.

PICKET LINES. See **Administrative Procedure**, 7; **National Labor Relations Act**, 2; **Unions.**

PIRACY OF RECORDS AND TAPES. See **Constitutional Law**, I; IX; **Copyrights**, 1–3.

PLANS OF REAPPORTIONMENT. See **Constitutional Law**, III, 1–7; **Jurisdiction**, 7.

PLEADINGS. See **Administrative Procedure Act; Injunctions**, 1–2; **Jurisdiction**, 2; **National Environmental Policy Act; Standing to Sue.**

POLICE STATIONS. See **Constitutional Law**, VI, 2; **Search and Seizure**, 2.

POLITICAL DISCRIMINATION. See **Constitutional Law**, III, 4, 7; **Jurisdiction**, 7.

POLITICAL-FAIRNESS PRINCIPLE. See **Constitutional Law**, III, 5–6.

POLITICAL INCUMBENTS. See **Constitutional Law**, III, 1–3.

POLITICAL SUBDIVISIONS. See **Constitutional Law,** III, 1–3.

POPULATION DEVIATIONS. See **Constitutional Law,** III, 1–7; **Jurisdiction,** 7.

POSSESSION OF STOLEN CHECKS. See **Constitutional Law,** IV, 2; **Evidence,** 3–5.

POST EXCHANGES. See **Constitutional Law,** X; **Taxes,** 4.

PRE-EMPTION. See **Constitutional Law,** I; IX; **Copyrights,** 1–3.

PREMARKETING CLEARANCES. See **Administrative Procedure,** 1–6; **Evidence,** 1–2; **Federal Food, Drug, and Cosmetic Act,** 1–6; **Judicial Review,** 1; **Jurisdiction,** 1; **Procedure,** 3.

PRESCRIPTION. See **Federal-State Relations,** 1; **Public Lands.**

PRESCRIPTION DRUGS. See **Administrative Procedure,** 3; **Federal Food, Drug, and Cosmetic Act,** 6; **Procedure,** 3.

PRESUMPTIONS. See **Constitutional Law,** II, 6; IV, 2; **Evidence,** 3–5.

PRIMARY JURISDICTION. See **Administrative Procedure,** 1–6; **Evidence,** 1–2; **Federal Food, Drug, and Cosmetic Act,** 1–6; **Interstate Commerce Commission; Judicial Review,** 1–2; **Jurisdiction,** 1; **Procedure,** 3–4.

"PRIMARY JURISDICTION" OVER APPORTIONMENT. See **Constitutional Law,** III, 1–3.

PRIOR WATER RIGHTS. See **Jurisdiction,** 4.

PRISONERS. See **Federal Tort Claims Act,** 1–3.

PRIVACY. See **Constitutional Law,** VIII, 1–2; **Immunity,** 1–3.

PRIVILEGE. See **Constitutional Law,** VIII, 1–2; **Immunity,** 1–3.

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law,** IV, 2; **Evidence,** 3–5.

PROBABLE CAUSE. See **Constitutional Law,** VI, 2; **Search and Seizure,** 2.

PROBATION. See also **Constitutional Law,** II, 7.

Revocation of probation—Traffic citation—Due process.—Issuance of traffic citation was not an "arrest" under either Missouri or Arkansas law, and finding that petitioner violated his probation conditions was so totally devoid of evidentiary support as to violate due process. Even were it clear that respondent judge held Missouri law to be that traffic citation is equivalent to arrest, such an unforeseeable holding, retroactively applied, would also deprive petitioner of due process. Douglas v. Buder, p. 430.

PROCEDURAL DUE PROCESS. See **Jurisdiction**, 5–6.

PROCEDURE. See also **Administrative Procedure**, 1–6; **Administrative Procedure Act**; **Constitutional Law**, II, 1, 5–6; IV, 1; VI, 1–2; VII; X; **Courts-Martial**; **Evidence**, 1–2; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Habeas Corpus**; **Indians**, 2; **Injunctions**, 1–2; **Interstate Commerce Commission**; **Judicial Review**, 1–2; **Jurisdiction**, 1–3; **National Environmental Policy Act**; **Search and Seizure**, 1; **Standing to Sue**; **Taxes**, 4.

1. *Alibi defense—Reciprocal discovery—Due process.*—Reciprocal discovery is required by fundamental fairness and it is insufficient that although statute does not require it, State might grant reciprocal discovery in a given case. In absence of fair notice that petitioner will have opportunity to discover State's rebuttal witnesses, petitioner cannot, consistently with due process requirements, be required to reveal his alibi defense. Wardius v. Oregon, p. 470.

2. *Denial of speedy trial—Dismissal of the charges.*—In light of policies underlying the right to a speedy trial, dismissal of the charges must remain, as noted in *Barker* v. *Wingo*, 407 U. S. 514, 522, "the only possible remedy" for deprivation of the constitutional right. Strunk v. United States, p. 434.

3. *Federal Food, Drug, and Cosmetic Act—Administrative hearing—Appeal.*—Where petitioner had an opportunity to litigate the "new drug" issue before the FDA and to raise the issue on appeal to a court of appeals, it may not relitigate the issue in another proceeding. CIBA Corp. v. Weinberger, p. 640.

4. *ICC approval of charges—Judicial review—Injunctions.*—District Court's action suspending separate in-transit charges for grain inspection approved by the ICC, and remanding the case to the ICC, is affirmed as to the remand and reversed as to the injunction suspending the proposed charges. Atchison, T. & S. F. R. Co. v. Wichita Bd. of Trade, p. 800.

5. *Increased sentence on retrial—Double jeopardy—Due process—Knowledge of jury.*—Rendition of higher sentence by jury on retrial does not violate the Double Jeopardy Clause, and does not offend the Due Process Clause as long as the jury is not informed of the prior sentence and the second sentence is not otherwise shown to be product of vindictiveness. Nor does the possibility of higher sentence impermissibly "chill" exercise of criminal defendant's right to challenge his first conviction by direct appeal or collateral attack. Chaffin v. Stynchcombe, p. 17.

6. *Lesser included offenses—Major Crimes Act of 1885—Indians.*—An Indian prosecuted in federal court under the Act is entitled to a jury instruction on lesser included offenses, if the facts warrant. Such

PROCEDURE—Continued.

an instruction would not expand the reach of the Act or permit the Government to infringe the residual jurisdiction of the Indian tribes by bringing in federal court prosecutions not authorized by statute. Keeble v. United States, p. 205.

7. *Retroactivity—Increased sentence on retrial—Due process.*—The "prophylactic" due process limitations established by *North Carolina* v. *Pearce*, 395 U. S. 711, to guard against the possibility of vindictiveness in cases where judge imposes more severe sentence after a new trial, are not retroactively applicable to resentencing proceedings that, like the one involved here, occurred prior to the date of the *Pearce* decision. Michigan v. Payne, p. 47.

PROOF. See **Constitutional Law**, VI, 1; **Search and Seizure**, 1.

PROPERTY LAW. See **Federal-State Relations**, 1; **Public Lands.**

PROSPECTIVITY. See **Constitutional Law**, II, 5; **Procedure**, 7.

PROTECTION OF COPYRIGHTS. See **Constitutional Law**, I; IX; **Copyrights**, 1–3.

PROTECTION OF RECORDINGS. See **Constitutional Law**, I; IX; **Copyrights**, 1–3.

PROXIMATE CAUSE. See **Federal Tort Claims Act**, 1–3.

PUBLICATION OF REPORTS. See **Constitutional Law**, VIII, 1–2; **Immunity**, 1–3.

PUBLIC DISTRIBUTION OF REPORTS. See **Constitutional Law**, VIII, 1–2; **Immunity**, 1–3.

PUBLIC ISSUES. See **Constitutional Law**, V; **Federal Communications Act.**

PUBLIC LANDS. See also **Federal-State Relations**, 1.

Acquisition by deed and condemnation—Mineral reservations—Subsequent Louisiana statute.—Under settled principles governing the choice of law by federal courts, Louisiana's Act 315 of 1940 does not apply to mineral reservations agreed to by the parties in 1937 and 1939. To permit state legislation to abrogate explicit terms of prior federal land acquisition would seriously impair federal statutory programs and the certainty and finality indispensable to land acquisitions. United States v. Little Lake Misere Land Co., p. 580.

PUBLIC PRINTER. See **Constitutional Law**, VIII, 1–2; **Immunity**, 1–3.

PUBLIC SAFETY EXPENDITURES. See **Internal Revenue Code**, 1; **Taxes**, 2.

PUBLIC SCHOOLS. See **Attorneys' Fees**, 1; **Constitutional Law**, VIII, 1–2; **Emergency School Aid Act of 1972**; **Immunity**, 1–3.

PUBLIC TRUSTEES. See **Constitutional Law**, V; **Federal Communications Act.**

PUPILS. See **Constitutional Law**, VIII, 1–2; **Immunity**, 1–3.

PURCHASES OF LAND. See **Federal-State Relations**, 1; **Public Lands.**

PURCHASES OF LIQUOR. See **Constitutional Law**, X; **Taxes**, 4.

PYRAMID LAKE. See **Jurisdiction**, 4.

RACIAL GROUPS. See **Constitutional Law**, III, 4, 7; **Jurisdiction**, 7.

RACINE, WISCONSIN. See **Jurisdiction**, 5–6.

RADIO BROADCASTING. See **Constitutional Law**, V; **Federal Communications Act.**

RAILROAD-HIGHWAY INTERSECTIONS. See **Internal Revenue Code**, 1; **Taxes**, 2.

RAILROADS. See **Administrative Procedure Act**; **Injunctions**, 1–2; **Internal Revenue Code**, 1; **Interstate Commerce Commission**; **Judicial Review**, 2; **Jurisdiction**, 2; **National Environmental Policy Act**; **Procedure**, 4; **Standing to Sue**; **Taxes**, 2.

RATE CHANGES. See **Interstate Commerce Commission**; **Judicial Review**, 2; **Procedure**, 4.

RATE INCREASES. See **Administrative Procedure Act**; **Injunctions**, 1–2; **Jurisdiction**, 2; **National Environmental Policy Act**; **Standing to Sue.**

RATIONAL CONNECTION. See **Constitutional Law**, IV, 2; **Evidence**, 3–5.

REAL PROPERTY. See **Federal-State Relations**, 1; **Public Lands.**

REAPPORTIONMENT. See **Constitutional Law**, III, 1–7; **Jurisdiction**, 7.

REASONABLE-DOUBT STANDARD. See **Constitutional Law**, IV, 2; **Evidence**, 3–5.

REASONABLENESS OF FINES. See **Administrative Procedure**, 7; **National Labor Relations Act**, 2; **Unions.**

REBUTTAL WITNESSES. See **Constitutional Law**, II, 1; **Procedure**, 1.

RECIPROCAL DISCOVERY. See **Constitutional Law**, II, 1; **Procedure**, 1.

RECLAMATION PROJECTS. See **Jurisdiction**, 4.

RECONVICTIONS. See **Constitutional Law**, II, 5; IV, 1; **Procedure**, 5–7.

RECORD PIRACY. See **Constitutional Law**, I; IX; **Copyrights**, 1–3.

RECREATIONAL HARM. See **Administrative Procedure Act**; **Injunctions**, 1–2; **Jurisdiction**, 2; **National Environmental Policy Act**; **Standing to Sue.**

RECYCLABLE MATERIALS. See **Administrative Procedure Act**; **Injunctions**, 1–2; **Jurisdiction**, 2; **National Environmental Policy Act**; **Standing to Sue.**

REDISTRICTING. See **Constitutional Law**, III, 1–7; **Jurisdiction**, 7.

REDUCTION OF SENTENCE. See **Constitutional Law**, VII; **Procedure**, 2.

REFUND SUITS. See **Internal Revenue Code**, 1; **Taxes**, 2.

REFUSING PAID EDITORIAL ADVERTISEMENTS. See **Constitutional Law**, V; **Federal Communications Act.**

REGULATION OF DRUG PRODUCTS. See **Administrative Procedure**, 1–6; **Evidence**, 1–2; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Judicial Review**, 1; **Jurisdiction**, 1; **Procedure**, 3.

REGULATIONS. See **Constitutional Law**, X; **Federal Communications Act**; **Taxes**, 4.

REINSTATEMENT OF UNION MEMBER. See **Attorneys' Fees**, 2; **Labor-Management Reporting and Disclosure Act.**

RELEASE FROM CONFINEMENT. See **Courts-Martial**; **Habeas Corpus.**

RELIANCE ON SUPREME COURT DECISIONS. See **Federal-State Relations**, 2; **Indians**, 3; **Taxes**, 3.

RELIEF. See **Administrative Procedure**, 3; **Courts-Martial**; **Federal Food, Drug, and Cosmetic Act**, 6; **Habeas Corpus**; **Jurisdiction**, 5–6; **Procedure**, 3.

REMANDS. See **Interstate Commerce Commission**; **Judicial Review**, 2; **Procedure**, 4.

REMEDIES. See **Constitutional Law**, VII; **Procedure**, 2.

RENEWAL OF LICENSES. See **Jurisdiction**, 5–6.

REPEALS BY IMPLICATION. See **Administrative Procedure Act**; **Injunctions**, 1–2; **Jurisdiction**, 2; **National Environmental Policy Act**; **Standing to Sue.**

REPORTS. See **Constitutional Law**, VIII, 1–2; **Immunity**, 1–3.

RESENTENCES. See **Constitutional Law**, II, 5; IV, 1; **Procedure**, 5, 7.

RESERVATION INDIANS. See **Indians**, 1–2; **Jurisdiction**, 3; **Procedure**, 6.

RESERVATIONS IN DEEDS. See **Federal-State Relations**, 1; **Public Lands.**

RESERVATIONS OF MINERAL RIGHTS. See **Federal-State Relations**, 1; **Public Lands.**

RESIDENCE. See **Constitutional Law**, II, 6.

RESIGNATION FROM UNION. See **Administrative Procedure**, 7; **National Labor Relations Act**, 2; **Unions.**

RETAIL LIQUOR ESTABLISHMENTS. See **Jurisdiction**, 5–6.

RETRIALS. See **Constitutional Law**, II, 5; IV, 1; **Procedure**, 5, 7.

RETROACTIVITY. See **Constitutional Law**, II, 5, 7; **Federal-State Relations**, 1; **Probation**; **Procedure**, 7; **Public Lands.**

REVOCATION OF PROBATION. See **Constitutional Law**, II, 7; **Probation.**

RIGHT OF ACCESS TO MEDIA. See **Constitutional Law**, V; **Federal Communications Act.**

RIGHT TO COUNSEL. See **Courts-Martial**; **Habeas Corpus.**

RIGHT TO WITHHOLD CONSENT. See **Constitutional Law**, VI, 1; **Search and Seizure**, 1.

RITONIC CAPSULES. See **Administrative Procedure**, 3; **Federal Food, Drug, and Cosmetic Act**, 6; **Procedure**, 3.

RULES OF CRIMINAL PROCEDURE. See **Indians**, 2; **Jurisdiction**, 3; **Procedure**, 6.

SAFETY OF DRUGS. See **Administrative Procedure**, 1–6; **Evidence**, 1–2; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Judicial Review**, 1; **Jurisdiction**, 1; **Procedure**, 3.

SALE OF LIQUOR. See **Constitutional Law**, X; **Taxes**, 4.

SALES TAXES. See **Constitutional Law**, X; **Taxes**, 4.

SAMPLES FROM FINGERNAILS. See **Constitutional Law**, VI, 2; **Search and Seizure**, 2.

SCHOOLCHILDREN. See **Constitutional Law**, VIII, 1–2; **Immunity**, 1–3.

SCHOOL EMPLOYEES. See **Constitutional Law**, VIII, 1–2; **Immunity**, 1–3.

SCHOOLS. See **Attorneys' Fees**, 1; **Constitutional Law**, VIII, 1–2; **Emergency School Aid Act of 1972**; **Immunity**, 1–3.

SCIENTER. See **Internal Revenue Code**, 2; **Taxes**, 1.

SCIENTIFIC INVESTIGATIONS. See **Administrative Procedure**, 1–6; **Evidence**, 1–2; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Judicial Review**, 1; **Jurisdiction**, 1; **Procedure**, 3.

SCRAPINGS FROM FINGERNAILS. See **Constitutional Law**, VI, 2; **Search and Seizure**, 2.

SCRAP MATERIALS. See **Administrative Procedure Act**; **Injunctions**, 1–2; **Jurisdiction**, 2; **National Environmental Policy Act**; **Standing to Sue.**

SEARCH AND SEIZURE. See also **Constitutional Law**, VI, 1–2.

1. *Consented search—Knowledge of right to withhold consent.*—When subject of search is not in custody and State would justify search on basis of consent, Fourth and Fourteenth Amendments require that it demonstrate that consent was in fact voluntary; voluntariness is to be determined from the totality of surrounding circumstances. While knowledge of right to refuse consent is a factor to be taken into account, State need not prove that one giving permission to search knew that he had right to withhold consent. Schneckloth v. Bustamonte, p. 218.

2. *Station-house detention—Probable cause—Fingernail scrapings.*—In view of station-house detention upon probable cause in murder case, the very limited intrusion, by taking scrapings from respondent's fingernails, undertaken to preserve highly evanescent evidence was not violative of the Fourth and Fourteenth Amendments. Cupp v. Murphy, p. 291.

SEARCH OF AUTOMOBILES. See **Constitutional Law**, VI, 1; **Search and Seizure**, 1.

SELECTIVE RATE INCREASES. See **Administrative Procedure Act**; **Injunctions**, 1–2; **Jurisdiction**, 2; **National Environmental Policy Act**; **Standing to Sue.**

SELF-INCRIMINATION. See **Constitutional Law**, IV, 2; **Evidence**, 3–5.

SENTENCES. See **Constitutional Law,** II, 5; IV, 1; VII; **Procedure,** 2, 5, 7.

SERVING AS JUROR. See **Constitutional Law,** II, 2.

SERVITUDES. See **Federal-State Relations,** 1; **Public Lands.**

SHERIFF'S EMPLOYEES. See **Federal Tort Claims Act,** 1–3.

SHIP'S STORES. See **Constitutional Law,** X; **Taxes,** 4.

SINGLE-MEMBER DISTRICTS. See **Constitutional Law,** III, 4, 7; **Jurisdiction,** 7.

SIXTH AMENDMENT. See **Constitutional Law,** VII; **Procedure,** 2.

SPEECH OR DEBATE CLAUSE. See **Constitutional Law,** VIII, 1–2; **Immunity,** 1–3.

SPEEDY TRIALS. See **Constitutional Law,** VII; **Procedure,** 2.

SPOT ANNOUNCEMENTS. See **Constitutional Law,** V; **Federal Communications Act.**

STAFF MEMBERS. See **Constitutional Law,** VIII, 1–2; **Immunity,** 1–3.

STANDARDS. See **Administrative Procedure,** 1–6; **Attorneys' Fees,** 1; **Constitutional Law,** III, 4, 7; **Emergency School Aid Act of 1972; Evidence,** 1–2; **Federal Food, Drug, and Cosmetic Act,** 1–6; **Judicial Review,** 1; **Jurisdiction,** 1, 7; **Procedure,** 3.

STANDING TO SUE. See also **Administrative Procedure Act; Injunctions,** 1–2; **Jurisdiction,** 2; **National Environmental Policy Act.**

Persons aggrieved—Administrative Procedure Act.—Appellees' pleadings sufficiently alleged that they were "adversely affected" or "aggrieved" within the meaning of § 10 of the Act to withstand a motion to dismiss on the ground of lack of standing to sue. Standing is not confined to those who show economic harm, as "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society." United States v. SCRAP, p. 669.

STATE ATTORNEY GENERAL. See **Jurisdiction,** 5–6.

STATE ESTATE TAXES. See **Federal-State Relations,** 2; **Indians,** 3; **Taxes,** 3.

STATE LEGISLATIVE APPORTIONMENT. See **Constitutional Law,** III, 1–7; **Jurisdiction,** 7.

STATE PROTECTION OF RECORDINGS. See **Constitutional Law**, I; IX; **Copyrights**, 1–3.

STATE TAX COMMISSION. See **Constitutional Law**, X; **Taxes**, 4.

STATE UNIVERSITIES. See **Constitutional Law**, II, 6.

STATION-HOUSE DETENTION. See **Constitutional Law**, VI, 2; **Search and Seizure**, 2.

STATUTORY INFERENCES. See **Constitutional Law**, IV, 2; **Evidence**, 3–5.

STATUTORY PRESUMPTIONS. See **Constitutional Law**, II, 6.

STATUTORY STANDARDS. See **Administrative Procedure**, 1–6; **Evidence**, 1–2; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Judicial Review**, 1; **Jurisdiction**, 1; **Procedure**, 3.

STAY. See **Courts-Martial**; **Habeas Corpus.**

STOLEN CHECKS. See **Constitutional Law**, IV, 2; **Evidence**, 3–5.

STRENGTH OF POLITICAL PARTIES. See **Constitutional Law**, III, 5–6.

STRIKEBREAKERS. See **Administrative Procedure**, 7; **National Labor Relations Act**, 2; **Unions.**

STRIKES. See **Administrative Procedure**, 7; **National Labor Relations Act**, 2; **Unions.**

STUDENTS. See **Constitutional Law**, II, 6; VIII, 1–2; **Immunity**, 1–3.

SUBSIDIES. See **Internal Revenue Code**, 1; **Taxes**, 2.

SUBSTANTIAL EQUALITY OF POPULATION. See **Constitutional Law**, III, 5–6.

SUBSTANTIAL EVIDENCE. See **Administrative Procedure**, 1–6; **Evidence**, 1–2; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Judicial Review**, 1; **Jurisdiction**, 1; **Procedure**, 3.

SUCCESSFUL LITIGANTS. See **Attorneys' Fees**, 1–2; **Emergency School Aid Act of 1972**; **Labor-Management Reporting and Disclosure Act.**

SUICIDES. See **Federal Tort Claims Act**, 1–3.

SUITS TO QUIET TITLE. See **Federal-State Relations**, 1; **Public Lands.**

SUMMARY COURTS-MARTIAL. See **Courts-Martial**; **Habeas Corpus.**

SUMMARY-JUDGMENT PROCEDURE. See **Administrative Procedure**, 1–6; **Evidence**, 1–2; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Judicial Review**, 1; **Jurisdiction**, 1; **Procedure**, 3.

SUPERINTENDENT OF DOCUMENTS. See **Constitutional Law**, VIII, 1–2; **Immunity**, 1–3.

SUPREMACY CLAUSE. See **Constitutional Law**, I; IX; X; **Copyrights**, 1–3; **Taxes**, 4.

SUPREME COURT. See **Constitutional Law**, III, 4, 7; **Jurisdiction**, 4, 7.

SUPREME COURT DECISIONS. See **Federal-State Relations**, 2; **Indians**, 3; **Taxes**, 3.

SURCHARGES. See **Administrative Procedure Act; Injunctions**, 1–2; **Jurisdiction**, 2; **National Environmental Policy Act; Standing to Sue.**

SURVEILLANCE OF PRISONERS. See **Federal Tort Claims Act**, 1–3.

SUSPECTS. See **Constitutional Law**, VI, 2; **Search and Seizure**, 2.

SUSPENDED SENTENCES. See **Constitutional Law**, II, 7; **Probation.**

SUSPENSION OF CHARGES. See **Interstate Commerce Commission; Judicial Review**, 2, **Procedure**, 4.

SUSPENSION OF RATE INCREASES. See **Administrative Procedure Act; Injunctions**, 1–2; **Jurisdiction**, 2; **National Environmental Policy Act; Standing to Sue.**

SUSPENSIONS. See **Administrative Procedure**, 1–6; **Evidence**, 1–2; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Judicial Review**, 1; **Jurisdiction**, 1; **Procedure**, 3.

TAPE PIRACY. See **Constitutional Law**, I; IX; **Copyrights**, 1–3.

TAXES. See also **Constitutional Law**, X; **Federal-State Relations**, 2; **Indians**, 3; **Internal Revenue Code**, 1–2.

1. *Federal income tax returns—Lesser included offense—"Willfully."*—Word "willfully" has same meaning in 26 U. S. C. §§ 7206 (1) and 7207, connoting voluntary, intentional violation of known legal duty, and the distinction between the statutes is found in the additional misconduct that is essential to the violation of the felony provision; hence, the District Court properly refused the requested lesser-included-offense instruction based on respondent's erroneous

TAXES—Continued.

contention that word "willfully" in misdemeanor statute implied less scienter than same word in felony statute. United States v. Bishop, p. 346.

2. *Income taxes—Depreciation of Government's cost in assets—Highway-railroad improvements.*—Governmental subsidies did not constitute contributions to respondent's capital within meaning of § 113 (a) (8) of Internal Revenue Code of 1939; the assets in question have a zero basis; and respondent cannot claim a depreciation deduction with respect thereto. United States v. Chicago, B. & Q. R. Co., p. 401.

3. *Oklahoma estate tax—Payment by United States as trustee—Reliance on Supreme Court decision.*—United States did not breach its fiduciary duty as trustee of Indian property by paying Oklahoma estate tax assessed against estate of deceased, a restricted Osage Indian, in reliance on *West* v. *Oklahoma*, 334 U. S. 717, which had upheld the validity of tax as applied to the same kind of estate. United States v. Mason, p. 391.

4. *Sales tax—State markup on liquor—Exclusive federal jurisdiction.*—Whether the markup can be viewed as sales tax to whose imposition in the context of two exclusive-jurisdiction bases the United States has consented under the Buck Act, and whether, in any event, the markup unconstitutionally taxes federal instrumentalities, and violates the Supremacy Clause as conflicting with federal procurement regulations and policy, are issues that the District Court did not reach and should consider initially on remand. United States v. Mississippi Tax Comm'n, p. 363.

TAX RETURNS. See **Internal Revenue Code**, 2; **Taxes**, 1.

TELECOMMUNICATIONS. See **Constitutional Law**, V; **Federal Communications Act.**

TENNESSEE. See **Attorneys' Fees**, 1; **Emergency School Aid Act of 1972.**

TERMINATION OF INDIAN RESERVATIONS. See **Indians**, 1.

TEXAS. See **Constitutional Law**, III, 1–4, 7; **Jurisdiction**, 7.

THREE-JUDGE COURTS. See **Constitutional Law**, III, 4, 7; **Jurisdiction**, 7.

TITLE TO LAND. See **Federal-State Relations**, 1; **Public Lands.**

TORT CLAIMS. See **Federal Tort Claims Act**, 1–3.

TOTALITY OF CIRCUMSTANCES. See **Constitutional Law**, VI, 1; **Search and Seizure**, 1.

TRAFFIC CITATIONS. See **Constitutional Law,** II, 7; **Probation.**

TRAFFIC VIOLATIONS. See **Constitutional Law,** VI, 1; **Search and Seizure,** 1.

TRANSPORTATION. See **Interstate Commerce Commission; Judicial Review,** 2; **Procedure,** 4.

TREASURY CHECKS. See **Constitutional Law,** IV, 2; **Evidence,** 3–5.

TRIALS. See **Constitutional Law,** VII; **Procedure,** 2.

TRUCK DRIVERS. See **Constitutional Law,** II, 7; **Probation.**

TRUCKEE RIVER. See **Jurisdiction,** 4.

TRUSTEE OF INDIAN PROPERTY. See **Federal-State Relations,** 2; **Indians,** 3; **Taxes,** 3.

TUITION RATES. See **Constitutional Law,** II, 6.

TWENTY-FIRST AMENDMENT. See **Constitutional Law,** X; **Taxes,** 4.

UNCOUNSELED MILITARY PERSONNEL. See **Courts-Martial; Habeas Corpus.**

UNEXPLAINED POSSESSION OF STOLEN PROPERTY. See **Constitutional Law,** IV, 2; **Evidence,** 3–5.

UNFAIR LABOR PRACTICES. See **Administrative Procedure,** 7; **National Labor Relations Act,** 2; **Unions.**

UNFORESEEABLE HOLDINGS. See **Constitutional Law,** II, 7; **Probation.**

UNION BYLAWS. See **National Labor Relations Act,** 1; **Unions.**

UNION CONSTITUTIONS. See **National Labor Relations Act,** 1; **Unions.**

UNIONS. See also **Administrative Procedure,** 7; **Attorneys' Fees,** 2; **Labor-Management Reporting and Disclosure Act; National Labor Relations Act,** 1–2.

Strikebreaking—Court enforcement of fines—Unfair labor practice.—Where the Union's constitution and bylaws are silent on subject of voluntary resignation from the Union, Union committed an unfair labor practice when it sought court enforcement of fines imposed for strikebreaking activities by employees who had resigned from the Union, even though Union constitution expressly prohibited members from strikebreaking. Machinists & Aerospace Workers v. NLRB, p. 84.

UNITED STATES MARSHALS. See **Federal Tort Claims Act**, 1–3.

UNITED STATES TREASURY CHECKS. See **Constitutional Law**, IV, 2; **Evidence**, 3–5.

UNIVERSITY STUDENTS. See **Constitutional Law**, II, 6.

UNNAMED MEMBERS OF CLASS. See **Courts-Martial**; **Habeas Corpus.**

UPSTREAM WATER USE. See **Jurisdiction**, 4.

VILIFICATION OF UNION MANAGEMENT. See **Attorneys' Fees**, 2; **Labor-Management Reporting and Disclosure Act.**

VINDICTIVENESS. See **Constitutional Law**, II, 5; IV, 1; **Procedure**, 5, 7.

VIOLATION OF PROBATION. See **Constitutional Law**, II, 7; **Probation.**

VOLUNTARINESS. See **Constitutional Law**, VI, 1; **Search and Seizure**, 1.

VOLUNTARY CONSENT. See **Constitutional Law**, VI, 1; **Search and Seizure**, 1.

VOLUNTARY VISIT TO POLICE STATION. See **Constitutional Law**, VI, 2; **Search and Seizure**, 2.

WARRANTLESS SEARCHES. See **Constitutional Law**, VI, 2; **Search and Seizure**, 2.

WATER RIGHTS. See **Jurisdiction**, 4.

WHISKEY. See **Constitutional Law**, X; **Taxes**, 4.

WHOLESALE MARKUPS. See **Constitutional Law**, X; **Taxes**, 4.

WILDLIFE REFUGES. See **Federal-State Relations**, 1; **Public Lands.**

"WILLFULLY." See **Internal Revenue Code**, 2; **Taxes**, 1.

WISCONSIN. See **Jurisdiction**, 5–6.

WITHDRAWAL OF APPROVAL. See **Administrative Procedure**, 1–6; **Evidence**, 1–2; **Federal Food, Drug, and Cosmetic Act**, 1–6; **Judicial Review**, 1; **Jurisdiction**, 1; **Procedure**, 3.

WITNESSES. See **Constitutional Law**, II, 1; **Procedure**, 1.

WORDS.

1. *"Indian country."* 18 U. S. C. § 1151. Mattz v. Arnett, p. 481.
2. *"Person."* 42 U. S. C. § 1983. City of Kenosha v. Bruno, p. 507.
3. *"Willfully."* 26 U. S. C. §§ 7206, 7207. United States v. Bishop, p. 346.

WORKERS. See **Administrative Procedure**, 7; **National Labor Relations Act**, 2; **Unions.**

WORLDWIDE CLASS. See **Courts-Martial**; **Habeas Corpus.**

"WRITINGS." See **Constitutional Law**, I, IX; **Copyrights**, 1–3.

YUROK INDIANS. See **Indians**, 1.